

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Onésimus Defense, LLC

File: B-411123.3; B-411123.4

Date: July 24, 2015

Brandon R. Erhardt, Onésimus Defense, LLC, the protester.
Nancy L. Combs, Esq., Department of Defense, for the agency.
Pedro E. Briones, Esq., and Nora K. Adkins, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest of an agency's corrective action amending a solicitation's pricing provisions for travel costs is denied where the record shows the agency's decision to amend the solicitation and seek revised proposals as part of its corrective action was reasonable and within the range of the agency's broad discretion in this area.
2. Protest of a solicitation's pricing provisions, amended as part of an agency's corrective action in response to the protester's earlier protests, is denied where the protester is not prejudiced by the amended pricing provisions.

DECISION

Onésimus Defense, LLC, of Summerville, South Carolina, protests corrective actions taken by the Defense Logistics Agency-Energy (DLA) under request for proposals (RFP) No. SP0600-14-R-0422 for confined space training. Onésimus argues that the agency's corrective actions, which amended the RFP's pricing provisions for travel costs, are improper under the circumstances, taken in bad faith, and inconsistent with procurement regulations.

We deny the protest in part and dismiss it in part.

This is Onésimus's third protest of this procurement, which is being conducted using the commercial item procedures of Federal Acquisition Regulation (FAR) part 12 and has been set aside for small businesses. See RFP amend. 6, at 1, 67, 71; Agency Report (AR) at 11. The first protest filed with our Office challenged DLA's initial award decision, alleging that the agency's price evaluation failed to consider

offerors' proposed travel costs and resulted in a flawed best-value determination and source selection decision.

In response to the first protest, DLA informed the parties that it would take corrective action by amending the RFP to correct its price evaluation criteria, re-open negotiations, and conduct a new best-value determination.¹ We dismissed the protest because DLA's proposed corrective action rendered the protest academic. Onésimus Defense, LLC, B-411123, Feb. 18, 2015 (non-digested dismissal).

Onésimus filed a second protest, alleging that DLA's corrective action did not address Onésimus's original protest grounds and was taken in bad faith to favor the awardee. Onésimus also objected to amending the RFP's pricing provisions for travel costs, because, according to the protester, the original provisions were not flawed or protested by the industry. Moreover, Onésimus argued that the amended provisions were not consistent with specified FAR provisions, and would result in a flawed best-value determination.²

In response to the second protest, DLA informed the parties that it would further amend the solicitation's pricing structure, methodology, and evaluation criteria to address the issues raised by Onésimus.³ We also dismissed the second protest as academic. Onésimus Defense, LLC, B-411123.2, Apr. 2, 2015 (non-digested dismissal).

Onésimus filed the instant protest (its third, including supplemental protest grounds), challenging, once again, the agency's corrective action. Onésimus reprises many of its earlier complaints, including its challenge of the solicitation's

¹ The agency did not reopen the competition but only requested revised proposals from the eight original offerors. See RFP amend. 5, at 5-7; RFP amend. 6, at 1; RFP amend. 7, at 1, 3. The agency explains in this regard that its contracting officer determined that: (1) there was adequate competition within the existing pool of small business offerors; (2) no advantage would be gained by reopening the competition; and (3) the amendments would likely not result in interest from additional offerors because the requirement had not changed and the revised terms were no more favorable to industry than those in the original solicitation. AR at 5.

² The RFP (originally and as currently amended) states that award will be made on a best-value tradeoff basis considering price and a number of non-price factors not relevant here. RFP amend. 6, at 71-73; RFP amend. 4, at 2.

³ The RFP was amended seven times: the original solicitation was amended four times prior to Onésimus's first protest; amendment no. 5 was issued in response to Onésimus's first protest; and amendments nos. 6 and 7 (mostly at issue here) were issued in response to Onésimus's second protest.

amended pricing provisions. While our decision here does not specifically discuss each of the protester's various arguments, we have considered all of Onésimus's contentions and find none furnishes a basis to sustain the protest.

DISCUSSION

As a preliminary matter, we decline Onésimus's request that we address the merits of its first protest challenging DLA's initial evaluation and award decision. As we explained in our first dismissal decision, DLA's corrective action rendered those protest grounds academic, and our Office does not consider academic protests. Onésimus Defense, LLC, B-411123, *supra*. We thus dismiss Onésimus's continuing arguments that DLA did not evaluate initial proposals according to the RFP's original evaluation criteria, and that offerors who submitted initial proposals that were non-compliant with the original evaluation criteria should be disqualified from the competition. See Trujillo/AHW, JV, B-403958.4, Oct. 13, 2011, 2011 CPD ¶ 218 at 3 n.2 (declining to reinstate initial evaluation protest because underlying basis of that protest rendered academic by corrective action); AdaRose Inc.--Protest & Costs, B-299091.2, Jan. 14, 2008, 2008 CPD ¶ 18 at 3 (protest that was academic is not "revived" by subsequent agency action); QuanTech, Inc.--Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 2 (no legal basis for our Office to render decision on original protest because corrective action effectively concedes that initial award decision was improper, and the procurement decision that protester would have us consider no longer exists).

Challenges to Scope of Corrective Action

Onésimus argues that DLA's corrective action--i.e., modifying the RFP's pricing provisions for travel costs--is unreasonable because, according to Onésimus, the original provisions were not flawed. Onésimus points out in this regard that the solicitation was not protested by the industry prior to submission of proposals, and that DLA's technical requirements have not changed. Onésimus asserts that the original pricing provisions are best suited for this acquisition, as evidenced by the number of proposals received, and continues to allege that the RFP was amended as a pretext to award the contract to the (initial) awardee.

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; Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. Evergreen Helicopters of Alaska, Inc., B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128 at 8. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern

that caused the agency to take corrective action. Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3.

As relevant here, the original RFP required offerors to propose travel costs under a fixed-price contract line item (CLIN), and stated that the evaluation of offeror's price proposals would include total cost for the contract performance period. RFP amend. 1, at 2-3; RFP amend. 4, at 3. As amended, the RFP now requires offerors to propose estimated travel costs (not-to-exceed (NTE) amounts specified for each performance year) under a time-and-materials (T&M) CLIN, and states that travel costs are estimates that will not be evaluated for award purposes.⁴ RFP amend. 6, at 66, 73; Schedule, at 4-9; RFP amend. 7, at 3.

DLA states that, after Onésimus filed its protests, the agency reviewed the requirement and its acquisition strategy, and realized that the RFP's original pricing provisions did not reflect DLA's intent. See, e.g., Tab 15, Amended Source Selection Plan.⁵ The agency states that the original pricing provisions (requiring offerors to propose travel costs on a fixed-price basis, as described above) increased the risks to the agency of paying higher prices for the confined space training. In this regard, DLA's view is that it is not possible, at the time of contract award, to accurately estimate long distance travel costs for the 5-year contract period with any reasonable degree of certainty, because of fluctuating travel costs such as air fare.⁶ Moreover, the agency states that the performance locations could change over the performance period due to DLA's security posture or mission. Thus, according to the agency, proposing travel costs on a fixed-price basis (for all performance periods) could potentially and unnecessarily drive up costs by forcing offerors to price for market volatility and potential performance changes.⁷ DLA

⁴ Amendment no. 7 clarified that the T&M CLIN was only for long distance travel expenses (i.e. airfare), and did not include labor hours spent traveling to/from the place of performance, which were to be included in the RFP's fixed-price CLIN for an offeror's proposed class fee. RFP amend. 7, at 3; see RFP amend. 6, Schedule, at 5-9.

⁵ Onésimus was not represented by counsel who could obtain access to non-public information (such as DLA's source selection plan) pursuant to the terms of a protective order. Accordingly, our discussion of some aspects of the procurement record is necessarily general in nature in order to avoid reference to non-public information. Our conclusions, however, are based on our review of the entire record, including the non-public information.

⁶ The contractor must provide training classes in Alaska, California, Texas, Virginia, Bahrain, Germany, and Korea. RFP amend. 6, Performance Work Statement, at 11; RFP amend. 7, at 2.

⁷ Onésimus acknowledges that travel market volatility and changes in performance locations are "unknowns" or "uncertainties" in this procurement. Comments at 6.

explains that it determined that it is most appropriate for offerors to propose travel costs on a T&M basis, which provides for reimbursement of actual travel expenses. DLA further states that the original RFP was overly complex for the commercial services being acquired and contained internal inconsistencies and other flaws.

In our view, DLA's determination that it could decrease risks and costs to the government provides an eminently reasonable basis for amending the RFP's travel pricing provisions. A contracting agency has the discretion to determine its needs and the best method to accommodate them, and we will not question an agency's determination of its needs unless that determination has no reasonable basis. See Womack Mach. Supply Co., B-407990, May 3, 2013, 2013 CPD ¶ 117 at 3. The adequacy of the agency's justification of its needs is ascertained through examining whether the agency's explanation is reasonable; that is, whether the explanation can withstand logical scrutiny. See Leidos, Inc., B-409214.4, Jan. 6, 2015, 2015 CPD ¶ 63 at 7. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Dynamic Access Sys., B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4.

We thus find DLA's corrective action reasonable; Onésimus's protest amounts to little more than the protester's preference for the original RFP pricing provisions and its disagreement with the agency's rationale for amending them. See, e.g., Tender Loving Care Ambulance & Ambulette Co., Inc., B-276571.2, July 17, 1997, 97-2 CPD ¶ 25 at 2-3 (canceling solicitation is reasonable where resolicitation may result in cost savings to the government⁸); A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2-3 (reasonable basis exists where solicitation overstates agency's minimum needs, such that cancellation of the solicitation and issuance of a revised solicitation would present the potential for increased costs savings). Quite simply, an agency's corrective action is reasonable if it is appropriate to remedy the flaw which the agency believes exists in its procurement process. Patriot Contract Servs. LLC, et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4.⁹

⁸ Although the original solicitation here was not cancelled per se, it was deleted and replaced in its entirety. RFP amend. 6, at 1; see supra n.3 (RFP amendments).

⁹ We (again) summarily dismiss as factually and legally insufficient, Onésimus's continuing (and unsubstantiated) allegations that DLA's corrective action was motivated by prejudice or bad faith. As we explained in our second dismissal decision, besides Onésimus's generalized claims, the protester has adduced no convincing evidence--nor is there any in the procurement record--that DLA's corrective action was motivated by bias towards the awardee. See Onésimus Defense, LLC, B-411123.2, supra, at 1 n.1, citing Computers Universal, Inc., B-410790.2, Feb. 25, 2015, 2015 CPD ¶ 83 at 3-4; Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-9 (government officials are presumed to act in good faith, and a protester's contention that procurement

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Challenges to Amended RFP Pricing Provisions¹⁰

Onésimus also contends that the amended pricing provisions are not consistent with the FAR and will result in a flawed best-value determination. According to Onésimus, DLA's use of a T&M "contract" here is inconsistent with FAR provisions governing the acquisition of commercial items.¹¹ Protest at 11-12; Comments at 7, citing FAR §§ 12.207(b), 16.601.

We deny this aspect of Onésimus's protest since, even were we to assume for the sake of argument that Onésimus's challenges to the amended pricing provisions have merit, the protester fails to demonstrate that it would be prejudiced by the new provisions. Competitive prejudice is a required element of every viable protest, and where none is shown, we will not sustain a protest. WKF Friedman Enters., B-411208, June 16, 2015, 2015 CPD ¶ 183 at 3. In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. Global Solutions Network, Inc., B-298682, Nov. 27, 2006, 2006 CPD ¶ 179 at 3.

For a number of reasons, the amended pricing provisions will not put Onésimus at a competitive disadvantage, or otherwise affect Onésimus's ability to re-compete for the requirement. Primarily, the amended solicitation permits all offerors to compete on an equal basis. In contrast to the original RFP, the amended RFP's price evaluation criteria now state that travel costs will not be evaluated for award purposes. Instead, the amended travel CLINs include NTE ceilings that Onésimus does not challenge. Moreover, as the agency points out, requiring offerors to propose travel costs on a fixed-price basis placed maximum risk for travel costs and any resulting increase or loss on the contractor. In contrast, the amended RFP pricing provisions reduce travel cost risk for both the agency and the contractor (albeit within specified ceilings). Onésimus does not claim that the amended terms

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officials are motivated by bias or bad faith must be supported by convincing proof). In fact, as DLA points out, the RFP schedule has been completely restructured such that offerors will be required to significantly revise their original price proposals.

¹⁰ While Onésimus protests the way in which the agency will conduct its corrective action, Onésimus's challenge to the RFP's amended pricing provisions is analogous to a challenge to the terms of a solicitation. Domain Name Alliance Registry, supra, at 7.

¹¹ Contrary to Onésimus's repeated assertions, the RFP, in all its various iterations, provides for award of a fixed-price contract, not a T&M contract. RFP at 1; RFP amend. 1, at 2; RFP amend. 2, at 4; RFP amend. 4, at 3; RFP amend. 5, at 4; RFP amend. 7, at 3.

put it at a competitive disadvantage, nor has Onésimus shown that the use of a T&M line items otherwise prejudices the firm's competitive position. Because Onésimus has not demonstrated that it was prejudiced by the amended terms, we deny this ground of protest.

Finally, Onésimus claims that not evaluating offerors' proposed travel costs will not permit DLA to determine which proposal offers the best-value. Onésimus's arguments in this regard are misplaced. For one, the amended RFP, as described above, provides for reimbursement of actual travel expenses up to specified ceilings. RFP amend. 7, at 3. Thus, all offerors will now compete on an equal footing in that regard, and their respective travel CLIN prices will not affect their competitive standing. Secondly, our Office has not objected to a solicitation that provides for non-evaluation of travel costs, or an agency's failure to evaluate travel costs where those costs will be reimbursed up to a NTE ceiling. See, e.g., James Foos & Assoc., B-249496.2, Jan. 6, 1993, 93-1 CPD ¶ 22 at 4-5 (solicitation may reasonably exclude evaluation of travel costs where it is not possible to estimate in advance the costs of providing travel within large geographic area); see also Argus & Black, Inc., B-405813, Jan. 3, 2012, 2012 CPD ¶ 218 at 2-3 (protest that awardee failed to price travel CLIN denied where solicitation provided for reimbursement of vendor's actual travel costs up to a NTE ceiling and agency evaluated vendor quotations equally in that regard).

We thus deny Onésimus's arguments challenging the amended pricing provisions. See CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 11-12 (protest that agency improperly utilized FAR policies and procedures for the acquisition of commercial items and services is denied where protester does not claim that any of the provisions or procedures unique to commercial item procurements put the protester at a competitive disadvantage, nor has the protester shown that the use of commercial item provisions or procedures otherwise prejudices the firm's competitive position); WKF Friedman Enters., supra (protest that agency improperly failed to include certain provisions in solicitation is denied where protester does not show that failure to include specified clauses will cause it competitive prejudice).

In sum, we find that Onésimus's protest of DLA's corrective action reflects little more than Onésimus's preference for the original RFP pricing provisions, and its attempt to relitigate its initial protest and exclude other offerors from the competition. See Protest B-411123.3 at 9 (The gravamen of Onésimus's protests is that DLA simply did not follow the RFP's original price evaluation criteria).

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel