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Decision

Matter of: Systems Plus, Inc.

File: B-413703.8

Date: May 10, 2017

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DIGEST

Protest challenging agency's corrective action, taken in response to an earlier Government Accountability Office protest, which consisted of responding to vendors' questions, publishing vendors' ratings and proposed prices, amending the solicitation, and requesting revised quotations, rather than reevaluating existing offers, is denied where the agency's decision was reasonably structured to remedy the flaw which the agency believes exists in its procurement process.

DECISION

Systems Plus, Inc., of Rockville, Maryland, protests the corrective action taken by the Defense Health Agency (DHA) in response to an earlier protest regarding request for quotations (RFQ) No. HT0015-16-R-0019, which was issued to acquire training support services for various legacy software applications. Systems Plus contends that DHA's decision to amend the solicitation and request revised quotations as part of the corrective action, rather than simply reevaluate vendors' past performance, was an unreasonable response to the earlier protest grounds challenging the agency's past performance evaluation.

We deny the protest.

BACKGROUND

DHA issued the solicitation as a request for proposals (RFP) on May 20, 2016, as a small business set-aside under General Services Administration (GSA) schedule IT 70, via the GSA e-Buy system, under Federal Acquisition Regulation Subpart 8.4.

Agency Report (AR), Tab 20, Initial RFP; Tab 21, Consolidated Performance Work Statement at 1. Proposals were due by June 20, 2016. Id. at 1.

On August 3, DHA changed the solicitation structure to an RFQ and established a deadline for receipt of quotations of August 15. RFQ at 1.¹ The agency intends to award a fixed-price contract consisting of a 1-month phase-in period, 6-month base period, and 1-year option period, to the vendor with the quotation representing the best value to the agency. Id. at 41; Amend. 0009. Quotations will be evaluated under three factors: technical approach, past performance and price. RFQ at 36. A quotation with a rating of unacceptable for any of the three technical approach sub-factors will be rated unacceptable for the technical approach factor and will be ineligible for award. Id. Among technically acceptable quotations, the agency will perform a best-value tradeoff between the past performance and price factors, with past performance being significantly more important than price. Id. at 36-37.

On September 1, DHA made award to Systems Plus. B-413703.7, Systems Plus Supp. Protest, Dec. 23, 2016, at 9. Systems Plus' price, technical rating, and past performance rating were revealed to the other vendors. AR, Tab 19, Unsuccessful Vendor Letters, Sept. 2, 2016. On September 9, LOUI Consulting Group, Inc. (LCGI), of Warner Robbins, Georgia, filed a protest challenging DHA's award. LCGI asserted that the agency's evaluation was flawed because Systems Plus' GSA schedule did not include all of the minimum requirements set forth in the RFQ and challenged the agency's past performance evaluation. B-413703.1, Protest, Sept. 9, 2016, at 12, 20. Another vendor, Nolij Consulting LLC (Nolij), of Vienna, Virginia, also filed a protest, alleging that DHA failed to conduct meaningful discussions with vendors. B-413703.2, Protest, Sept. 12, 2016. We dismissed the protests as academic on the basis of the agency's decision to take corrective action by reevaluating its past performance assessment and technical capability evaluation findings and making a new best value award decision. LOUI Consulting Grp., Inc.; Nolij Consulting LLC, B-413703 et al., Sept. 30, 2016 (unpublished decision).

On December 10, after completing its corrective action, DHA made award to LCGI and released LCGI's ratings and price to the unsuccessful vendors. AR, Tab 29, Unsuccessful Vendor Letters, Dec. 10, 2016. On December 19, Technology, Automation & Management, Inc., of Fairfax, Virginia, Nolij, and Systems Plus protested the award to LCGI. The protesters alleged that the agency's past performance evaluation was flawed. See, e.g., B-410703.4, Nolij Protest, at 8. In addition, Systems Plus alleged that DHA had "improperly failed to disqualify LCGI, because LCGI ha[d] not performed three recent and relevant Past Performance reference contracts as required by the Solicitation." B-413703.7, Protest of Systems Plus, at 2. According to Systems Plus, LCGI's "two existing prime

¹ We use the term RFQ, and the corresponding references to vendors and quotations, except when quoting the record.

contracts do not meet the [r]ecency and/or [r]elevancy descriptions.”² Id. at 14. Systems Plus asserted that DHA had “materially revised its [p]ast [p]erformance requirement without amending the [s]olicitation.” Id. at 12. In response to the protest, DHA again elected to take corrective action by “review[ing] the past performance evaluations,” “mak[ing] a new best value award decision” and taking “any other action” as appropriate. B-413703.4 et al., Notice of Corrective Action, Jan. 6, 2017. We dismissed the protests as academic on the basis of the agency’s commitments. Nolij Consulting, LLC et al., B-413703.4 et al., Jan. 11, 2017 (unpublished decision).

On January 24, 2017, the agency amended the past performance factor. AR, Tab 11, Notice to Vendors, Jan. 24, 2017; amend. 0008 at 35, 40. The past performance evaluation examines the recency, relevance, and performance quality of a vendor’s historical contract references. RFQ at 43. Prior to amendment 0008, the past performance factor, in section L of the RFQ, defined recency as follows:

To be considered recent, the past performance references may be for current contracts or those that ended no later than five (5) years prior to the due date for submission o[f] the proposal.

RFQ at 40. Also prior to amendment 0008, the evaluation section of the solicitation, section M, informed vendors that the agency would evaluate the recency of vendors’ past performance contract references, with an exclusion for references with insufficient history, as follows:

Recent contracts are those with any performance taking place within five (5) years immediately prior to the closing date of solicitation. The Government will not consider any new contracts (or modifications) awarded or where performance began within six (6) months of RFP release due to the limited performance history of these efforts.³

² In this regard, according to Systems Plus, one of LCGI’s contracts was awarded on February 17 with performance commencing on February 28, 2016, and therefore was not eligible for consideration as a contract reference under the terms of the solicitation prior to amendment 0008. B-410703.7, Protest, at 14.

³ With regard to recency of contract references, the initial RFP provided that the agency would examine how the past performance effort compared with the “scope and magnitude of effort and complexities this solicitation requires.” AR, Tab 20, Initial RFP, at 22. Because DHA concurrently amended the recency criterion and changed the solicitation from an RFP to an RFQ, i.e., we view the RFQ’s section M reference to the “RFP release” date as indicating the RFP release date of May 20, and not as a typographic error intending reference to the RFQ release date of August 3.

Id. at 45. The agency excluded new contracts because it did not wish to consider contract references with a “limited performance history.” Id. In its letter to vendors, DHA explained that it found the section L and M past performance provisions to be “contradictory.” AR, Tab 11, Ltr. to Vendors, Jan. 24, 2017. In order to “correct” this “defect,” DHA amended section M of the RFQ to read as follows:

To be considered recent, the past performance references may be for current contracts or those that ended no later than five (5) years prior to the last proposal due date.

AR, Tab 11, DHA Ltr. to Vendors, Jan. 24, 2017, at 1; amend. 0008 at 40.⁴ Thus, DHA removed the earlier provision prohibiting consideration of contracts or modifications awarded or commencing within 6 months of the May 20 initial release date, i.e., between November 20, 2015, and May 20, 2016. Furthermore, in order “to ensure a level playing field,” the agency released the prices and factor ratings of all vendors. AR, Tab 11, DHA Ltr. to Vendors, Jan. 24, 2017, at 2. Amendment 0008 also invited vendors to submit additional questions by January 30, and on January 30, DHA released answers to 12 vendor questions regarding the agency’s training needs and best-value tradeoff. Amend. 0008 at 34; AR, Tab 16, Questions & Answers. Vendors were permitted to make revisions to any portion of their quotations, and were “permitted to revise their past performance contract references.” DHA Ltr. to GAO, Apr. 18, 2017, at 2; Contracting Officer’s Statement of Facts (COSF) at 3. The agency also reduced the period of performance and extended the date for submission of quotations to February 6, 2017. Amend. 0008 at 2-30, 34.⁵

On February 3, 2017, Systems Plus filed the instant protest challenging the scope of the agency’s corrective action.

DISCUSSION

Systems Plus argues that DHA’s actual corrective action greatly exceeds the scope of its proposed corrective action, i.e., reevaluating vendors’ past performance contract references and making a new award decision. Protest at 1. The protester argues that the agency only committed to perform a past performance evaluation.

⁴ DHA also made minor stylistic changes to section L that are not relevant here.

⁵ In addition, DHA also again reduced the period of performance by approximately 2 months. Amend. 0009, Jan. 25, 2017, at 1; amend. 0010, Jan. 31, 2017, at 1-2. On February 9, DHA extended the quotation due date to February 16 and corrected an ambiguity in amendment 0009 regarding the period of performance. RFQ, amend. 0011 at 2. Subsequent emails to the parties--without a corresponding amendment--extended the quotation due date to February 17. AR, Tab 18, DHA Emails to Vendors.

Id. Systems Plus also alleges that the agency's solicitation revisions lack a reasonable basis. Id. at 13. In this regard, the protester contends that "(a) the Solicitation did not contain contradictory language, (b) the [past performance] revisions are misleading, (c) DHA would unnecessarily allow revisions to Technical and Price Proposals, (d) the corrective action does not remedy some issues identified in Systems Plus' earlier protest, and (e) the corrective action [including the release of offeror's prices'] appears to improperly favor one vendor, LCGI." Id. at 14, 21-22. For the reasons below, the protest is denied.⁶

Solicitation Revisions

The protester argues that there was "no contradiction" in the RFP past performance language and thus the agency lacked a reasonable basis for the deletion of the 6-month recency provision in the past performance factor in section M. Protest at 15, 17. For the reasons below, we agree with the protester that the provisions were not in conflict, but also find that the agency had a reasonable basis for amending the solicitation.

Contracting officials have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5. As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Id. Where an agency has reasonable concerns that there were errors in the procurement, the agency may take corrective action, even if it is not certain that a protest of the procurement would be sustained. See Main Bldg. Maint., Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. We will not object to the specific proposed corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. MSC Indus., supra, at 5.

The record here shows that the agency's actions were a reasonable response to drafting weaknesses in the solicitation. Sections L and M of the RFQ originally defined recent past performance references as "current contracts or those that ended no later than five (5) years prior to the due date for submission o[f] the proposal." RFQ at 40; Amend. 0008 at 35 ("Recent contracts are those with any performance taking place within five (5) years immediately prior to the closing date of solicitation."). Id. at 45. At the same time, section M of the RFQ also informed vendors that the agency would "not consider any new contracts (or modifications) awarded or where performance began within six (6) months of RFP release"

⁶ Although only some protest arguments are addressed below, all bases of protest have been reviewed, and none provides a basis to sustain the protest.

Id. at 45. The initial RFQ quotation due date was August 15, 2016, and so the 5-year period for recent past performance ran from August 16, 2011, to August 15, 2016. Furthermore, section M excluded from consideration contracts whose award or initial performance was within 6 months of the initial RFP release date of May 20, 2016, i.e., in the period from November 21, 2015, to May 20, 2016. DHA suggests that the broad consideration of “any performance” within the section L 5-year period conflicts with the section M restriction excluding contract references with performance only in the 6-month period prior to May 20. COSF at 2.

When faced with a potential inconsistency between solicitation terms, this Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of the provisions of the solicitation. Carahsoft Tech. Corp., B-401169; B-401169.2, June 29, 2009, 2009 CPD ¶ 134 at 6. To be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Id.; CliftonLarsonAllen, LLP, B-412938, B-412938.2, July 11, 2016, 2016 CPD ¶ 204 at 9-10. In this regard, a specific solicitation provision must properly prevail over a more general one. Low & Assocs., B-297444.2, Apr. 13, 2006, 2006 CPD ¶ 76 at 7; SeaSpace, B-239295, July 13, 1990, 90-2 CPD ¶ 33 at 3-5 (agency’s reading of general solicitation requirement in a manner that was inconsistent with a more specific requirement resulted in contract award that effectively waived the specific solicitation requirement to the competitive disadvantage of another vendor).

Here, we do not agree with the agency that there is a conflict. The solicitation provides that in the questioned period, i.e., the 6-month period prior to the RFP initial issuance date, the agency will consider only the performance of ongoing contracts; it will not consider the performance of new contracts. The solicitation also provides that it will consider the performance of new contracts subsequent to the 6-month period.⁷ The 6-month provision limits, but does not conflict with, the 5-year provision. See Low & Assocs., supra (specific provision will prevail over a general provision). As a result, the provisions are not in conflict. Nevertheless, they do not form a cohesive evaluation scheme, and the agency had a reasonable basis for modifying the RFQ.

Although the protester urges us to endorse this hopscotch approach, we agree with the agency that this approach, which excludes some performance but permits more

⁷ The due date for quotations is February 17, 2017. AR, Tab 18, DHA Emails to Vendors, Feb. 16, 2017. Thus, the 5-year period for recent contract references currently runs from February 18, 2012, to February 17, 2017. The RFQ prior to amendment 0008 excluded consideration of new performance in the period from November 21, 2015, to May 20, 2016. RFQ at 45. Yet the RFQ also allowed for consideration of even more current performance, i.e., that occurring between May 21, 2016 and February 17, 2017.

recent performance, is “unclear” and confusing. Memorandum of Law (MOL) at 2. Therefore, we find that the agency had a reasonable basis for amending this solicitation provision. See Grant Thornton LLP, B-408464, Sept. 25, 2013, 2013 CPD ¶ 238 at 5 (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).

Furthermore, regardless of the lack of conflict, we find nothing objectionable in the agency’s decision to amend the solicitation. See Salient Fed. Sols., Inc., B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 5 (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). Systems Plus’ protest amounts to little more than the protester’s preference for the original RFQ past performance provisions and its disagreement with the agency’s rationale for amending them. See Onésimus Defense, LLC, B-411123.3, B-411123.4, July 24, 2015, 2015 CPD ¶ 224 (denying challenge to the agency’s corrective action amending the terms of the solicitation where the agency had a reasonable basis for the changes). 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. Id.; Patriot Contract Servs. LLC, et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4. For these reasons, the protest is denied.

Technical & Price Revisions

In addition to challenging the amendments to the past performance factor, Systems Plus also argues the agency had no basis to permit offerors to submit revised technical or price volumes. Protest at 24. The protester contends that quotation revisions should have been limited to the past performance volume alone. Id. We disagree and find that the agency had a reasonable basis for allowing vendors to revise all aspects of their proposals.

GAO has explained that “when, either before or after receipt of quotations, the government changes or relaxes its requirements, it must issue an amendment to notify all vendors of the changed requirements and give them an opportunity to respond.” IBM-U.S. Federal, B-407073.3 et al., June 6, 2013, 2013 CPD ¶ 142 at 9,10; see also Diebold Inc., B-404823, June 2, 2011, 2011 CPD ¶ 117 at 4. Here, the agency amended the past performance factor and reasonably permitted vendors to revise their past performance submissions. Id. Furthermore, in addition to amending the past performance factor, on January 30, DHA also issued updated questions and answers that clarified the agency’s training needs and the intended best-value tradeoff. AR, Tab 16, Questions & Answers. Finally, the agency also reduced the period of performance. Amend. 0008 at 2-30.

The agency’s responses to vendor questions amended or clarified the RFQ’s technical requirements and changed the period of performance, and therefore the

agency reasonably allowed vendors to revise their technical and price quotations. Cooperative Muratori Riuniti, B-294980.5, July 27, 2005, 2005 CPD ¶ 144 at 7 (if the agency amends the solicitation after closing and permits offerors to revise their proposals in response, offerors should be permitted to revise any aspect of their proposals unless there is a reasonable basis for not allowing such revisions).

Release of Vendors' Ratings and Prices

Systems Plus argues that the agency improperly released vendors' ratings and prices and that DHA is turning the protest into an auction. Protest at 19, 21. DHA contends that the discretion afforded to it permits such action. MOL at 8.

An agency may decide to release vendors' prices in a recompetition in an effort to remedy the potential competitive advantage (even if not improperly obtained) held by the other vendors in the competition whose prices were not disclosed. See, e.g., Ocean Servs, LLC, B-292511.2, Nov. 6, 2003, 2003 CPD ¶ 206 at 4-6; Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3; The Cowperwood Co., B-274140.2, Dec. 26, 1996, 96-2 CPD ¶ 240 at 2-3. Here, the prices and ratings of Systems Plus and LCGI were each revealed after award. AR, Tab 11, DHA Ltr. to Vendors. Thus, the new information in the agency's disclosure is of the other vendors' prices and ratings. In this regard, we fail to see how Systems Plus was not the beneficiary of such competitive leveling. Prior to the agency's disclosure, Systems Plus knew only where it stood vis-à-vis LCGI, while all vendors knew where they stood versus the two prior awardees. Given that vendors are reasonably allowed to amend their technical and price quotations, DHA's disclosure allows Systems Plus (and LCGI) to do so with improved information.

Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. Arc Aspicio, LLC, et al., B-412612 et al., Apr. 11, 2016, 2016 CPD ¶ 117 at 7. A protester's disagreement with the agency's judgment, without more, does not establish that an evaluation was unreasonable. Id. The agency's release of prices and ratings benefits the previous awardees and places them on equal footing with the other vendors. On this basis, we find no competitive prejudice, and therefore no basis to sustain the protest.

Whether Corrective Action Favors LCGI

Systems Plus also contends that DHA's corrective action favors LCGI because it permits LCGI to continue to compete rather than being disqualified for failing to offer a sufficient number of recent contract references. Protest at 20-21.

An agency may amend a solicitation and request and evaluate another round of quotations where the record shows that the agency's decision to take this action was made in good faith, without the specific intent to change a particular vendor's technical ranking or to avoid making award to a particular vendor. Alfa Consult S.A., B-298164.2, B-298288, Aug. 3, 2006, 2006 CPD ¶ 127 at 2. Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86 at 5. Here, there have been multiple protests of the agency's past performance evaluation that directed the agency's attention to the past performance factor. The agency's review uncovered the hopscotch nature of the relevance provisions, which provided a reasonable basis for amending the solicitation. It is possible that the change to the past performance provision will allow LCGI and other vendors to submit one or more newly relevant contract references. However, nothing in the record suggests that the agency's decision was made in bad faith or intended to benefit any particular vendor.

The protest is denied.

Susan A. Poling
General Counsel