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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Gallup, Inc.

File: B-410126

Date: September 25, 2014

William E. Kruse, Esq., and Melissa T. Stratton, Esq., for the protester.
Michael K. Greene, Esq., Department of Homeland Security, for the agency.
Evan D. Wesser, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that a solicitation incorporates an overly-restrictive data rights clause and should incorporate a different clause is denied where the protester's argument is based on an incorrect interpretation of the clauses.
 2. Protest that a solicitation should include an alternate version of a data rights clause is denied where there is no legal requirement for inclusion of the alternate version, and the protester merely disagrees with the agency's determination of its needs.
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DECISION

Gallup, Inc. (Gallup), of Washington, DC, protests the terms of request for quotations (RFQ) No. HSHQDC-14-Q-00257, issued by the Department of Homeland Security (DHS), to conduct an Organizational Health Assessment for the DHS, Science and Technology Directorate (S&T Directorate). The protester asserts that the solicitation is flawed because it contains an overly-restrictive data rights clause and should be replaced with either a different clause, or one of the enumerated alternate versions of the clause.

We deny the protest.

BACKGROUND

The RFQ was issued on June 25, 2014, to interested vendors holding Federal Supply Schedule (FSS) contracts under schedule No. 874, mission oriented business integrated services (MOBIS), and anticipated the issuance of a fixed-price

task order. See RFQ at B.2, B.3, C.1.2. Under the performance work statement (PWS), awardee will be required to conduct an organizational health survey of the DHS, S&T Directorate, including interviews, focus group sessions, and meetings with S&T Directorate leadership to prioritize improvement areas. RFQ at C.2.

On July 11, DHS issued RFQ amendment No. 3. Among other changes, the amendment incorporated by reference Federal Acquisition Regulation (FAR) clause 52.227-14, Rights in Data – General (MAY 2014),¹ and (2) extended the closing time for quotations until 12:00 p.m., eastern time, on July 21.

On July 15, DHS responded to an offeror's question regarding the RFQ's data rights provision:

Question 3: Since DHS S&T has included clause 52.227-14, how would DHS consider an alternate intellectual property clause which would allow for use of survey instruments which were independently developed at private expense? Would an alternate IP clause impact the scoring and evaluation of the offeror?

Response: Under the authority of FAR 52.227-14, the contractor can and should, where applicable, assert rights to any work first produced. None of the evaluation criteria are dependent on whether the contractor is asserting any rights to any work first produced. No alternate clause is necessary (or will be considered) as FAR 52.227-14 provides all that is necessary for the contractor to assert its rights regarding any work performed under this acquisition.

Email from Contracting Officer (CO) to offerors (July 15, 2014).

On July 21, Gallup filed this protest with our Office prior to the 12:00 p.m. due date for the receipt of quotations on that date.²

¹ Although amendment No. 3 expressly incorporated by reference FAR clause 52.227-14 into section I.2 of the RFQ, the clause is already incorporated by reference into the MOBIS contract and, thus, was already a "flow down" provision pursuant to section I.1 of the RFQ.

² On July 17, Gallup filed an agency-level protest with DHS challenging the terms of the RFQ asserting the same grounds set forth in the protest before our Office. This protest was filed with our Office before DHS issued a decision on the agency-level protest. On July 28, DHS dismissed Gallup's agency-level protest as moot in light of this protest. See Email from CO to William E. Kruse, Esq. (July 28, 2014).

DISCUSSION

Gallup asserts that the inclusion of FAR clause 52.227-14, as opposed to FAR clause 52.227-17, Rights in Data – Special Works (DEC 2007), or, alternatively, FAR clause 52.227-14, Alternate II (DEC 2007), is unreasonable because FAR clause 52.227-14 effectively exceeds DHS’ needs. Specifically, Gallup contends that utilization of FAR clause 52.227-14 will prevent the awardee from delivering data subject to limited rights³ in performance of the resulting order and, therefore, “provides the Government with excessive rights beyond those necessary to complete the work specified under the solicitation.” Protest at 1.⁴ For the reasons discussed below, we find no basis to sustain the protest.

³ Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications. FAR clause 52.227-14(a). Limited rights means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of FAR clause 52.227-14(g)(3). Id. Under that provision, limited rights data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the contractor or unless provided for in the contract, be used for purposes of manufacture nor disclosed outside of the Government. Id. at (g)(3).

⁴ In its August 5 and August 14 submissions, Gallup asserts that, rather than alternatives, DHS should incorporate both FAR clause 52.227-17 and FAR clause 52.227-14, Alternate II into the RFQ. Compare Protest at 2 (“In the alternative, and in the event that the government still seeks to utilize FAR 52.227-14, Alternate II should be incorporated into the solicitation . . .” and “In light of the errors to [sic] the solicitation, Gallup hereby requests the issuance of a modification to the solicitation reflecting the inclusion of the appropriate rights in data clause, FAR 52.227-17, Rights in Data-Special Works, or in the alternative, incorporate FAR 52.227-14 Alternate II.” (emphasis added)) with Protester’s Response to Request for Dismissal (Aug. 5, 2014) (“When balancing the needs of the Government and the offeror . . . FAR 52.227-17 should be used for DHS’s survey data created under the contract, while FAR 52.227-14 Alternate II should be applied to any offeror’s pre-existing data, such as a survey instrument.” (emphasis added)) and Protester’s Response to Request for Dismissal (Aug. 5, 2014) at 1 (“Together, FAR 52.227-17 and 52.227-14 Alternate II provide DHS with broad data rights” (emphasis added)). To the extent that Gallup now seeks, after the July 21 closing time for the submission of quotations, to challenge the terms of the RFQ on the basis that both FAR clause 52.227-17 and FAR clause 52.227-14, Alternate II should be incorporated into the RFQ, this argument is untimely. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2014). These rules reflect the dual requirements of giving parties a fair
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Substitution of FAR clause 52.227-17

First, Gallup asserts that the RFQ should include FAR clause 52.227-17, in lieu of FAR clause 52.227-14, because the former provision would allow the awardee to deliver limited rights data under the resulting order. See Protest at 1. As discussed below, we deny this aspect of the protest because Gallup's assertion is predicated on a faulty interpretation of the applicable FAR clauses.

Gallup is correct that the basic version of FAR clause 52.227-14 does not allow a contractor to deliver data subject to limited rights to the government in the performance of a contract. Rather, FAR clause 52.227-14(g)(1) provides that the contractor may withhold from delivery certain limited rights data. Alternatively, if the contractor is authorized or required to deliver limited rights data under the contract, the government does not obtain unlimited rights in the data. Id. at (b)(1)(iv), (b)(2)(iv); see also FAR § 27.404-2(a), (c).

Contrary to Gallup's assertion, however, FAR clause 52.227-17 similarly does not allow a contractor to deliver data subject to limited rights to the government in the performance of a contract. As DHS correctly notes, FAR clause 52.227-17 does not contain any provisions for the identification and delivery or withholding of limited rights data. In contrast to the express limited rights provisions of FAR clause 52.227-14, under FAR clause 52.227-17(b)(1)(i), the government generally obtains unlimited rights in all data delivered under the contract or first produced in the performance of the contract. Thus, to the extent that Gallup argues that FAR clause 52.227-17 is more appropriate, Gallup fails to explain how the clause provides a greater degree of protection for its proprietary data. On this record, we deny this protest argument.

Inclusion of FAR clause 52.227-14, Alternate II

Alternatively, Gallup asserts that DHS was required to incorporate Alternate II to FAR clause 52.227-14 into the RFQ and, as a result of not incorporating the provision, will effectively and unreasonably restrict vendors from delivering any limited rights data to DHS under the resulting order. See Protest at 2; Protester's Response to GAO Questions (Aug. 14, 2014), at 2. As discussed below, we find no merit to this argument.

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opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4.

A contracting agency generally has the discretion to determine its needs and the best method to accommodate them. Y&K Maint. Inc., B-405310.2, Oct. 17, 2011, 2011 CPD ¶ 239 at 5. 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. Id. The fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency's needs. Id.

Here, we see nothing improper about DHS' decision to decline to incorporate any of the alternate provisions to FAR clause 52.227-14 into the RFQ. Gallup argues that DHS must include Alternate II because FAR § 27.402(b) requires the government "[to] balance the Government's needs and the contractor's legitimate proprietary interests." See, e.g., Protester's Response to Request for Dismissal (Aug. 5, 2014) at 2. Gallup, however, identifies nothing that requires DHS to accept the delivery of limited rights data. Gallup's disagreement with DHS' judgment not to require or accept limited rights data does not provide a basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel