



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: NCS Technologies, Inc.

File: B-413500.2

Date: February 14, 2017

Thomas K. David, Esq., Kenneth D. Brody, Esq., and Katherine A. David, Esq., David, Brody & Dondershine, LLP, for the protester.

Kevin Patrick Mullen, Esq., W. Jay DeVecchio, Esq., Steven W. Cave, Esq., and James A. Tucker, Esq., Morrison & Foerster LLP, for DRS Network & Imaging Systems, LLC, for the intervenor.

Steven R. Hall, Esq., and Brendan M. Klapak, Esq., United States Marine Corps, for the agency.

Katherine I. Riback, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the scope of the agency's corrective action in response to a prior protest wherein the agency limited proposal revisions is denied where the record shows that the agency reasonably limited proposal revisions to remedy the concern that caused the agency to take corrective action.

DECISION

NCS Technologies, Inc., of Gainesville, Virginia, protests the corrective action being taken by the United States Marine Corps, under request for quotations (RFQ) No. M67854-16-Q-4068, for commercially available deployable servers in support of Program Management Office, Marine Air-Ground Task Force Command, Control and Communications for the U.S. Marine Corps.¹ NCS maintains that the agency's corrective action is improper.

¹ The delivery order at issue in this protest was competed under Federal Acquisition Regulation (FAR) part 16 among firms previously awarded multiple-award indefinite-delivery contracts under the National Aeronautics and Space Administration (NASA) Solutions for Enterprise-Wide Procurement Government-Wide Acquisition contract program.

We deny the protest.

BACKGROUND

The RFQ, issued on July 5, 2016, contemplated the issuance of a fixed-priced delivery order for a certain number of deployable servers with an option to purchase an additional amount.² The solicitation established three evaluation criteria--price, technical and past performance--and stated that a task order award was to be made on a lowest-priced, technically acceptable basis. RFQ at 17. The solicitation provided that only the lowest-priced quotation would be evaluated for technical and past performance acceptability. Id. If the lowest-priced quotation was not found acceptable for those factors then the agency would progress to the next lowest-priced quotation until a quotation was determined to be acceptable under both non-price factors. Id.

The solicitation identified various minimum performance capabilities and characteristics. Id. at 2-5. The solicitation did not specify that vendors utilize a specific form or format to show that their products met those requirements. Of relevance to this protest, the RFQ required that the deployable servers meet the operating temperature parameters of 32°F to 104° (0°C to 40°C), and that the processor “operate at [the] highest temperature range at full capacity without throttling down to a lower speed.” Id. at 3. The solicitation also provided that the servers meet the non-operating temperature parameters of -40°F to 140°F (-40°C to 60°C). Id. The RFQ closed on July 6, and on July 21, the agency awarded a delivery order to DRS Networking & Imaging Systems LLC (DRS) valued at \$12,785,945.88.³ Protest at 4.

² We note that the solicitation issuance date on Standard Form 1449 is listed as July 5, 2016, but the Contracting Officer’s Statement states that the solicitation was published on June 9, 2016. Agency Report (AR) at 2.

³ The awarded value of the delivery order at issue exceeds \$10 million. Accordingly, at the time this protest was filed on November 7, 2016, this procurement was within our jurisdiction to hear protests related to the issuance of orders under multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) contracts that were awarded under the authority of Title 10 of the U.S. Code. 10 U.S.C. § 2304(e)(1)(B); see National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, § 835 (amending jurisdictional threshold to \$25 million for protests of orders placed under ID/IQ contracts awarded under authority of Title 10, effective December 23, 2016); Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107 at 5-6 (changes to jurisdiction will not be given retroactive effect, absent statutory direction).

NCS filed a protest in our Office challenging the propriety of the award to DRS. NCS alleged that the product literature for the deployable server that DRS proposed showed that those servers did not meet the temperature parameters specified in the RFQ. NCS Initial Protest at 4. The agency filed a request for summary dismissal in which it argued that whether or not DRS' proposed server meets the performance specifications laid out in the RFQ is a matter of contract administration and, therefore, not for review by our Office. Agency Request for Summary Dismissal (Aug. 24, 2016), at 3. The agency's request for summary dismissal included the actual quotation submitted by DRS. Agency Request for Summary Dismissal, Tab 3, DRS Quotation. On August 31, NCS responded to the agency's request for summary dismissal, and filed a supplemental protest. In its supplemental protest NCS argued that DRS' quotation affirmed that its proposed product would meet every solicitation specification except the required "operating temperature" range for the servers. NCS Response to Agency Summary Dismissal Request and Supplemental Protest (Aug. 31, 2016), at 4.

On September 9, the parties were notified that our Office would not dismiss the protest without further development. GAO Email to Parties Denying Summary Dismissal Request (Sept. 9, 2016). The agency then advised our Office of the following:

[T]he Agency has reviewed the quotations provided by both Awardee (DRS) and Protester (noting that since NCS was not the lowest priced vendor, the Agency had no need to, and did not, review this information prior to the protest) and determined that the solicitation's instructions regarding what vendors were required to provide, in order to demonstrate compliance, should have been more clear. Notably, the solicitation did not require vendors to state their bases for asserting that an item met a stated performance requirement, and did not provide a uniform format for vendors to do so, thus ensuring all relevant information was submitted. Accordingly, the Agency will provide both parties with a spreadsheet clearly identifying the information required to demonstrate the compliance of its previously offered product and, based upon the information provided in this spreadsheet and in accordance with the solicitation's stated evaluation criteria, evaluate and determine technical acceptability.

AR, Tab 6, Agency Corrective Action Letter (Sept. 15, 2016), at 1. We dismissed NCS' protest as the agency's corrective action rendered the protest academic.

On October 28, the agency provided NCS and DRS with an updated compliance matrix, and instructions concerning how and when to respond. AR, Tab 2, Corrective Action Letter to DRS (Oct. 28, 2016); Tab 3, Corrective Action Letter to NCS (Oct. 28, 2016). The notice stated that the "original performance requirements

have not changed in any substantial way,” that the vendors were only to submit the completed compliance matrix and that “[a]ny additional submitted documentation [would] NOT be considered or evaluated.” Id. at 1-2 (emphasis in original). The agency informed NCS and DRS that it would use the previously submitted prices. Id. at 2.

NCS and DRS were also given the opportunity to ask questions regarding the corrective action. AR, Tab 2, Corrective Action Letter to DRS (Oct. 28, 2016) at 1; Tab 3, Corrective Action Letter to NCS (Oct. 28, 2016) at 1. NCS submitted nine initial questions by the November 2 due date for questions, and later submitted two additional questions. AR, Tab 4, NCS Questions Regarding Corrective Action Letter (Nov. 2, 2016). Of relevance to this protest is the following question posed by NCS, and the agency’s response:

If the USMC does not ‘freeze’ the proposed servers and their publicly available documentation as they were on July 6, is it correct to believe that vendors will be allowed to propose different servers; be they the same make & model but with updates or wholly new altogether? If ‘new’ servers can be proposed, it seems that the USMC must therefore allow vendors to submit revised pricing consistent with the “new” servers being offered.

ANSWER: Vendors must demonstrate the compliance of the server model they offered in their 6 July quotation submission. No changes to pricing or server model will be considered.

AR, Tab 5, Agency Responses to Questions (Nov. 4, 2016), at 2. Thereafter, NCS filed this protest challenging the agency’s ongoing corrective action.

DISCUSSION

NCS objects to the scope of the agency’s corrective action. NCS’ protest is primarily based on its assertion that vendors should be permitted to revise all aspects of their proposals. NCS also asserts that the agency’s corrective action amounts to discussions because the agency’s communications with DRS will assist the agency in determining the technical acceptability of DRS’s quotation. Therefore, NCS contends that it should be allowed to revise all aspects of its proposal. As detailed below, we find no basis to sustain the protest.

NCS first alleges that the corrective action is unreasonable because it is limited in nature and does not allow the protester to propose a different server model at a new price. NCS Comments at 7-8. According to NCS, “[b]y limiting their corrective action as such, not only have they ignored the numerous other valid concerns raised by the protester, but more importantly, they have merely asked for the same information the parties originally provided with their proposals.” Id. at 6.

Contracting officers have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. See The Matthews Group, Inc. t/a TMG Constr. Corp., B-408003.2, B-408004.2, June 17, 2013, 2013 CPD ¶ 148 at 5; See Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7. 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 CPD ¶ 162 at 4.

In this instance we find that the protester's premise that all of its protest allegations are valid or meritorious is incorrect because our Office has not previously considered these issues and concluded that any of the issues raised by NCS in its protest were meritorious. An agency's corrective is reasonable if it is appropriate to remedy the concern that caused the agency to take corrective action. Louisiana Clearwater, Inc.--Recon. & Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 5 n.2.

Here, we find the scope of the agency's proposed corrective action to be reasonable as the agency determined that the solicitation's instructions regarding what information the vendors were required to provide in order to demonstrate compliance should have been more clear. As a result, the agency fashioned a corrective action that addressed this perceived solicitation deficiency. Indeed, the solicitation did not provide or require any particular format for vendors to show that their proposed servers met the solicitation requirements. Because we find that the scope of the agency's corrective action is reasonable, we deny this protest allegation.

NCS also asserts that the agency's corrective action constitutes discussions, which in turn meant that the agency should have allowed vendors to revise their quotations.⁴ Protest at 9; Comments at 11. The protester argues that it should have been allowed to propose a different, slightly less expensive, model of the server than it proposed. Id. at 7. The agency, while not stating whether it views its limited exchanges with the vendors as discussions, argues, that, even if these exchanges are discussions, the agency may properly limit exchanges with vendors

⁴ The regulations concerning discussions under FAR part 15, which pertain to negotiated procurements, do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, such as the procurement for the delivery order here. P3I, Inc.; Quantech Serv's., Inc., B-405563.4 et al., Aug. 6, 2015, 2015 CPD ¶ 333 at 13. Section 16.505 of the FAR does not establish specific requirements for discussions in a delivery order competition; nonetheless, when exchanges with the agency occur in delivery order competitions, they must be fair and not misleading. P3I, Inc.; Quantech Serv's., Inc., supra.

in this manner in a corrective action. Here we need not reach the question of whether the agency's exchanges from vendors constitutes discussions, because we agree, that even if they are discussions, the agency's actions are reasonable.

An agency's discretion when taking corrective action extends to the scope of quotation revisions. See, e.g., Computer Assocs. Int'l., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5; Rel-Tek Sys. & Design, Inc.--Modification of Remedy, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions; an agency, in conducting discussions to implement corrective action, may, however, reasonably limit the scope of revisions. See System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 3-4. Where the corrective action does not also include amending the solicitation, we will not question an agency's decision to restrict proposal revisions when taking corrective action so long as it is reasonable in nature and remedies the established or suspected procurement impropriety. See Consolidated Eng'g Servs., Inc., B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 3-4.

We find nothing unreasonable about the agency's decision to limit the revisions that vendors may make to their quotations. The corrective action was taken to address an issue identified in response to a prior protest filed by NCS, namely that unclear RFQ instructions did not provide a uniform format for responses, or a uniform, level basis for subsequent evaluation. The limited information sought by the agency during corrective action addresses that issue. While NCS would prefer to revise its quotation and lower its price, we find that here the limitations on revising quotations were reasonable as the agency did not amend the solicitation requirements or the evaluation methodology.⁵

The protest is denied.

Susan A. Poling
General Counsel

⁵ To the extent that NCS' protest alleges that DRS' deployable servers are not technically acceptable, its argument is premature as the agency has not, at this time, made a final source selection decision. See Northrop Grumman Tech. Servs., Inc., B-404636.11, June 15, 2011, 2011 CPD ¶ 121 at 4 (preaward protest alleging unequal discussions is premature).