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Decision

Matter of: Knight Point Systems, LLC

File: B-414802

Date: September 20, 2017

Francis E. Purcell, Jr., Esq., Thomas O. Mason, Esq., Joseph R. Berger, Esq., and Raymond C. McCann, Esq., Thompson Hine LLP, for the protester.
JoAnn W. Melesky, Esq., Anthony J. Balestreri, Esq., and Daniel C. McIntosh, Esq., Defense Information Systems Agency, for the agency.
Paula J. Haurilesko, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest to GAO is timely where, consistent with GAO Bid Protest Regulations and decisions, the protester filed its agency-level protest before the next closing time for receipt of proposals and filed its protest with our Office within 10 days of an adverse agency action.
 2. Protest that the agency improperly eliminated two of five technical/management subfactors is denied, where the elimination of the subfactors reflected the focus of the solicitation on the provision of services, rather than equipment.
 3. Protest that the agency unreasonably eliminated the use of pricing notes in a spreadsheet is denied, where the agency reasonably concluded that the removal of potentially hundreds of pricing notes for thousands of line items would reduce potential uncertainties during contract administration and the solicitation permitted offerors to provide explanations in a pricing narrative.
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DECISION

Knight Point Systems, LLC (KPS), of Reston, Virginia, protests the terms of request for proposals (RFP) No. HC1028-16-R-0012, issued by the Defense Information Systems Agency (DISA) for communication infrastructure services. KPS contends that the RFP, as amended, is improper.

We deny the protest.

BACKGROUND

The RFP, issued on August 2, 2016, provides for the award of a fixed-price indefinite-delivery, indefinite-quantity contract to provide state-of-the-art communications infrastructure capacity to meet new and emerging customer requirements as well as the ability to replace existing DISA communications capacity that has exceeded its technical or economic life. Agency Report (AR), Tab 2A, RFP, at 1, 35; Section J, attach. C-1, Performance Work Statement (PWS), at 1. The PWS states that, for all communications capacity requirements, the service provider will acquire, transport, and provide the necessary hardware, hardware maintenance, communications operating software, and service to support the communication infrastructure associated with the contract as a capacity service. PWS at 1.

The RFP contemplates a 5-year base period and five 1-year option periods. Id. at 24. As relevant here, the RFP includes Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.216-7006 – Ordering, which states in relevant part: “Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the contract schedule. Such orders may be issued from date of award through the end of the base period (and any option years, if exercised).” RFP at 24.

The RFP, as originally issued, provided for award to the offeror whose proposal was the most advantageous to the government, considering two compliance requirements and the following evaluation factors: technical/management, past performance, cost/price, and small business participation plan. RFP at 49. The RFP stated that all non-cost/price factors were of equal importance and that, when combined, the non-cost/price factors were approximately equal to cost/price. Id.

The technical/management factor was comprised of four equally-weighted subfactors: physical network solutions, virtual network solutions, service delivery: design support, and service delivery: management. Id. Under the physical network solutions and virtual network solutions subfactors, the government would evaluate each offeror’s ability to provide solutions that meet or exceed the technical requirements outlined by the government. Id. at 51. The RFP further stated that the evaluation would focus on the minimum technical requirements of each category of devices and licenses listed in the PWS. Id. In this regard, the PWS required the contractor to provide flexible, highly-scalable solutions for various appliances, firewalls, load balancers, and routers for both the physical and virtual networks. See PWS at 3-9. The PWS contained appendices that listed various devices, example products, and minimum features. See PWS, append. 5-1, Design Specification, and append. 5-2, Virtual Appliance Design Specification.

With respect to cost/price, the RFP states that cost/price will be evaluated based on the total evaluated price proposed for the base period and all option periods. RFP at 53. The RFP requires offerors to provide monthly unit pricing via a “cost model”--a spreadsheet containing about 3200 line items of the various devices listed in the PWS

appendices and “non-capacity” line items such as hourly rates for technical assistance and travel. See RFP § L, at 43; § J, Exh. B-1, Cost Model. The cost model, as originally issued, contained a column for offerors’ pricing notes. Id. § J, Exh. B-1, Cost Model. The RFP directed offerors to use the pricing notes to indicate if the price for a line item was not separately priced and to provide a detailed supporting rationale. RFP § L, at 43. The RFP also provides for offerors to include a pricing narrative that contained no page limits. Id. at 37.

The RFP was amended 13 times. As relevant here, amendment 12, issued on May 1, 2017, removes the physical network solutions and virtual network solutions subfactors from the technical/management factor, and the pricing notes from the cost model. RFP amend. 12, § M, at 2; § L, at 10. The amendment also adds a requirement for offerors to provide a letter certifying that all equipment/software to be provided will meet the minimum requirements stated in the PWS and PWS appendices. RFP amend. 12, § L, at 12; attach. L-4, Sample Certification Letter. The letter requires offerors to agree to replace equipment that does not meet the minimum requirements within five business days, and at no additional cost to the government. RFP amend. 12, attach. L-4, Sample Certification Letter.

With respect to the pricing notes, the amendment states that an offeror that includes pricing notes will be ineligible for award. Id., § L, at 10. Amendment 13 clarifies that if a line item is not separately priced, offerors should provide a detailed rationale in the pricing narrative. RFP amend. 13, § L, at 10. The amendments state that “not separately priced items should be used as minimally as possible.” RFP amend. 12, § L, at 10; id. amend. 13, § L, at 10.

As a result of the amendments, the technical/management factor now contains three subfactors: service delivery: design support, service delivery: management, and integration/migration.¹ RFP amend. 12 § M, at 4. Proposals are to be evaluated under the service delivery: design support subfactor for the offeror’s ability to provide specialized on-site support, focusing on the process that the offeror plans to follow to respond to requests for specialized technical support, to recruit and provide skilled resources, and to manage the personnel. Id. Under the service delivery: management subfactor, proposals are to be evaluated as to how effectively the offeror’s performance of the delivery function of the solutions in selected PWS sections meet or exceed the requirement. Id. Under the integration/migration subfactor, proposals are to be evaluated for the offeror’s ability to provide solutions, including expected timelines for completion of the requirements outlined in specific PWS sections, focusing on the solutions, procedures, processes, methods, and/or services offered. Id.

¹ An interface/integration subfactor was added by RFP amendment 4 and later amended as the integration/migration subfactor. Combined Contracting Officer’s Statement/Memorandum of Law (COS/MOL) at 7; AR, Tab 2E, RFP amend. 4, § M.2.0.

On May 26, four days before the closing date for receipt of revised proposals,² KPS filed an agency-level protest alleging issues with amendment 12. AR, Tab B, Agency-Level Protest, at 1. On June 5, DISA dismissed KPS's protest as untimely. Protest, Attach. 1, DISA Response to Agency-Level Protest, at 25. Upon receipt of the agency's dismissal of its protest, KPS protested to our Office.

DISCUSSION

KPS contends that RFP amendment 12 creates the ability for DISA to place new capacity orders during the contract's option years, unreasonably deletes two technical subfactors and replaced them with a self-certification letter, and improperly prohibits offerors from including pricing notes in the cost model. We have considered all of KPS's arguments and although we do not address all of them, we find that none provide a basis for sustaining the protest.³ We discuss several issues below.

Timeliness

Agency-Level Protest

DISA requests that we dismiss KPS's protest in its entirety on the basis that its protest to the agency was untimely filed more than 10 days after DISA issued amendment 12. Request for Dismissal at 7. As noted above, before the closing date for receipt of revised proposals, KPS filed an agency-level protest alleging issues with amendment 12. DISA dismissed KPS's protest as untimely because the protest was filed more than 10 days after DISA issued amendment 12. KPS then filed its protest with our Office, within 10 days of DISA's dismissal of the agency-level protest.

The agency states that, unlike GAO's Bid Protest Regulations, the Federal Acquisition Regulation (FAR) contains no provision concerning the timeliness of agency-level protests of alleged solicitation improprieties that do not exist in the initial solicitation. Id. In this regard, DISA states that the provision in FAR § 33.103(e) requiring protests to the agency based on alleged improprieties in a solicitation be filed before the closing date for receipt of proposals does not apply to protests of solicitation amendments

² By e-mail, the contracting officer extended the due date for revised proposals to May 30. COS/MOL at 9.

³ For example, KPS argues that DISA failed to provide contemporaneous documentation of its decisions with respect to amending the solicitation. See, e.g., Comments at 3. However, where, as here, the protester is challenging whether the agency had a reasonable basis for amending the solicitation, we will consider the entire record—including the agency's response to the protest. See NAC Int'l, Inc., B-310065, Nov. 21, 2007, 2008 CPD ¶ 3 at 7 n.4. As indicated below, we have reviewed the record and conclude that the agency's actions were reasonable.

issued after submission of initial proposals.⁴ Id. DISA maintains that the language, “[i]n all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier” controls. Id. (quoting FAR § 33.103(e)). DISA also maintains that our decisions support its position, citing to our decision in M2 Global Tech., Ltd., B-400946, Jan. 8, 2009, 2009 CPD ¶ 13, for the proposition that where there is no corresponding regulation in the FAR similar to the GAO Regulations, then the 10-day rule regarding when an offeror knew or should have known the basis for its protest applies. Id.

We decline to dismiss the protest for this reason. Under our Bid Protest Regulations, a matter initially protested to the contracting agency will be considered timely by our Office only if the agency protest was filed within the time limits provided by our Regulations unless the contracting agency imposes a more stringent time for filing, in which case the agency’s time for filing will control. 4 C.F.R. § 21.2(a)(3). Our regulations further provide that alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Id. § 21.2(a)(1).

Here, the closing date subsequent to the issuance of RFP amendments 12 and 13 was May 30, 2017. COS/MOL at 9; Protest, Attach. 1, DISA Response to Agency-Level Protest, at 5. KPS filed its agency-level protest on May 26, 2017, and filed its protest to our Office within 10 days of its receipt of the agency’s dismissal of its protest. AR, Tab B, KPS Agency-Level Protest, at 1. Because KPS filed its agency-level protest prior to the closing date for revised proposals, we conclude that KPS’s protest was timely filed for the purpose of establishing the timeliness of its protest to our Office. See, e.g., Mobile/Modular Express, B-246183, Nov. 13, 1991, 91-2 CPD ¶ 459 at 2-3 (GAO protest of agency’s release of pricing information in pre-award notice issued prior to request for best and final offers (BAFOs) untimely because agency-level protest was filed after due date for BAFOs).⁵ Moreover, DISA’s reliance on M2 Global Tech., Ltd. is unwarranted because that decision did not concern an alleged impropriety in a solicitation. In M2 Global Tech., Ltd., we found that the protest to GAO of the exclusion of the protester’s proposal from the competitive range was untimely because the

⁴ Section 33.103(e) states in relevant part, “Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.” FAR § 33.103(e).

⁵ However, we dismiss KPS’s arguments that DISA failed to provide accurate estimated evaluation quantities, Protest at 22-24, and that eliminating two evaluation subfactors increases the need for price realism analysis, id. at 31, because KPS failed to raise these arguments in its agency-level protest. 4 C.F.R. § 21.2(a)(3); Star Food Serv., Inc., B-408535, Nov. 1, 2013, 2013 CPD ¶ 246 at 4-5.

agency-level protest was filed after a pre-award debriefing rather than within 10 calendar days of the agency's notification letter advising the protester of the reasons for its exclusion. M2 Global Tech., Ltd., supra, at 2.

New Capacity During Option Years

In its protest, KPS argues that amendment 12 added the ability of the agency to place new capacity services orders during the contract's option years. According to KPS, the solicitation had only permitted orders for new capacity services during the base year, and this new requirement creates an ambiguity, prevents fair competition, leads to an unequal evaluation and creates an unduly restrictive requirement that limits competition. Protest at 16-22, 24-28.

DISA requests that we dismiss as untimely KPS's arguments concerning the agency's ability to place orders for new capacity during the contract's option years. Request for Dismissal at 5. DISA states that the inclusion of DFARS clause 252.216-7006 – Ordering, which appeared in the initial solicitation, placed offerors on notice that the agency intended to place orders for new capacity during the base and option years. Id. DISA states that RFP amendment 12 did not change the agency's ability to order during the option years, but instead more specifically stated the requirement. Id. KPS maintains that the DFARS clause is too generic to place offerors on notice because it refers to supplies and services to be furnished rather than to capacity services. Response to Request for Dismissal at 3.

Our timeliness rules 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). Here, the RFP, as originally issued on August 2, 2016, included DFARS clause 252.216-7006, which states, "Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the contract schedule. Such orders may be issued from date of award through the end of the base period (and any option years, if exercised)." RFP at 24. In our view, this language put offerors on notice that the agency intended to be able to order all elements of the PWS during both the base period and the option years. Moreover, KPS has identified no language in the RFP that would suggest that DISA intended to limit its ordering of new capacity services to the contract's base period. Because KPS did not object to the agency's ability to order new capacity services prior to the closing date for initial proposals, the protester's arguments concerning new capacity services are dismissed as untimely. See IAP World Servs., Inc.; Jones Lang LaSalle Americas, Inc., B-411659 et al., Sept. 23, 2015, 2015 CPD ¶ 302 at 15.

Elimination of Technical Subfactors

KPS objects to the elimination of the physical network solutions and virtual network solutions subfactors under the technical/management factor and the requirement for a self-certification letter in lieu of those subfactors. KPS contends that, by eliminating the

two subfactors, the agency has no way of determining whether an offeror's proposed solutions will meet the technical requirements of the RFP or the agency's actual needs, and the agency will be unable to judge the quality of the services to be provided. Comments at 6. In addition, KPS asserts that the elimination of the two subfactors violates the requirement in FAR § 15.305(a)(3) to assess each offeror's ability to accomplish the technical requirements of the solicitation. Id. at 7. Finally, KPS argues that substitution of the self-certification letter for the physical network solutions and virtual network solutions subfactors converts a best-value tradeoff award basis into a lowest-priced, technically-acceptable award basis. Protest at 34; Comments at 29-30. KPS argues that the agency's reliance on an unverifiable self-certification of technical compliance does not provide a mechanism by which the agency can verify the actual characteristics of a technical solution, and therefore it will be impossible for DISA to document a rationale for the best-value tradeoff.⁶ Protest at 36; Comments at 29-30.

DISA states that KPS's objections ignore the remaining three technical/management subfactors--service delivery: design support, service delivery: management, and integration/migration--which comply with the FAR § 15.304(c)(2) requirement to consider the quality of a product or service by considering such factors as technical excellence and management capability and personnel qualifications. Supp. MOL at 5-6. DISA also states that the removal of the physical network solutions and virtual network solutions subfactors streamlined the evaluation process, renewed the focus of the procurement on purchasing capacity as a service, and allowed for flexibility under the contract to meet the government's requirements for scalability of services. COS/MOL at 35. DISA further states that the two subfactors focused on the minimum technical requirements of each piece of hardware the contractor must provide to perform the necessary capacity services, and thus in essence the two subfactors were essentially pass/fail factors. Id. Because the government is not purchasing the equipment, evaluating what equipment offerors use to meet the requirement was less important to the agency than evaluating the services to be provided under the contract. Id.

DISA states that the elimination of the two subfactors does not change the award basis from a best-value tradeoff to selection of the lowest-priced, technically-acceptable proposal. DISA explains that the remaining subfactors of the technical/management factor support a meaningful comparison and discrimination between and among offerors. COS/MOL at 39-40. DISA also states that the physical network solutions and virtual network solutions subfactors focused on the equipment that offerors will use to provide services and thus is not a key area of differentiation where the objective is to obtain services. Id. at 40. In addition, DISA states that the RFP does not state that the agency will evaluate the self-certification, but instead requires the contractor to replace, within five business days and at no additional cost to the government, any equipment that does not meet the requirements of the PWS and the relevant appendices. Id. at 41.

⁶ KPS acknowledges that, even without the self-certification, the winning offeror would still be legally bound to provide contract-compliant services. Comments at 29 n.10.

The determination of the agency's minimum needs and the best method of accommodating them is primarily within the agency's discretion. Premiere Vending, B-256437, June 23, 1994, 94-1 CPD ¶ 380 at 7. Moreover, agency acquisition officials have broad discretion in the selection of the evaluation criteria that will be used in an acquisition, and we will not object to a particular method as long as the method used reasonably relates to the agency's needs in choosing a contractor that will best serve the government's interests. Olympus Bldg. Servs., Inc., B-411474 et al., July 30, 2015, 2015 CPD ¶ 227 at 3. 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. Wittenberg Weiner Consulting, LLC, B-413460, Oct. 31, 2016, 2016 CPD ¶ 319 at 5.

Based on the record before us, we find the agency's elimination of the physical network solutions and virtual network solutions subfactors unobjectionable. The PWS includes numerous statements supporting DISA's claim that the focus of the procurement is the provision of services. For example, the PWS states that "[t]he purpose of this contract is to obtain reliable, responsive, and cost effective communication infrastructure services," PWS at 1, and that "[t]he contractor is to provide communication environment services using a 'utility use concept'. All capacity assets needed for the service shall be provided by the contractor when the utility concept is exercised." Id. at 2. In view of these and other similar statements throughout the PWS, we find no basis to find unreasonable the agency's intent to focus its evaluation on the provision of services with the remaining three technical/management subfactors--service delivery: design support, service delivery: management, and integration/migration--rather than the associated hardware and software.

In addition, although the original RFP stated that those two subfactors would evaluate offerors' ability to provide solutions that meet or exceed the technical requirements, the RFP also stated that DISA's evaluation under the two subfactors would focus on the minimum technical requirements for various categories listed in the PWS and PWS appendices. RFP at 51. These categories consisted of lists of appliances, licenses, and modules; included examples of products for each item; and also provided minimum features that must be met. See, e.g., PWS, append. 5-2, Virtual Appliance Design Specification, at 2-3. Given the RFP's stated focus on offerors' proposed solutions meeting the minimum requirements, we find the agency's decision to remove the subfactors in favor of a self-certification letter, which clarified that the PWS and PWS appendices 5-1 and 5-2 would be incorporated into the resulting contract, to be unobjectionable. To the extent that KPS questions whether DISA will actually receive items under the contract that comply with the PWS product specifications is a matter of contract administration, which is the responsibility of the contracting agency and not within the purview of our bid protest function. Standard Mfg. Co., Inc., B-236814, Jan. 4, 1990, 90-1 CPD ¶ 14 at 3.

With respect to KPS's assertion that the RFP's evaluation does not comply with the FAR § 15.305(a)(3) requirement that the contracting agency assess each offeror's ability to accomplish the technical requirements of the solicitation, we disagree. In our

view, the protester takes an overly narrow reading of the term “technical requirements” and provides no basis for its interpretation. The RFP, as amended, provides for evaluation of offerors’ ability to provide specialized on-site support, effective delivery of services, and the provision of solutions for new technology including migration and integration with existing systems. See RFP amend. 12, § M, at 4. The agency’s decision to accept a certification to provide items that meet the minimum specifications in lieu of evaluating each proposed item does not mean that the RFP does not provide for a technical evaluation, despite the protester’s objections to the agency’s judgment.

Further, the record provides no basis to sustain KPS’s protest that the removal of the subfactors and requirement for a self-certification letter converts a best-value tradeoff award basis into a lowest-priced, technically-acceptable award basis. As noted above, we find the elimination of the two subfactors unobjectionable. In light of the solicitation’s focus on the provision of communications infrastructure services and the inclusion of the service delivery: design support, service delivery: management, and integration/migration subfactors under the technical/management factor, in addition to the past performance and small business management factors, the protester has failed to demonstrate how the elimination of the two subfactors and inclusion of the self-certification letter converts the selection method to a lowest-priced, technically-acceptable methodology, or otherwise renders the agency’s solicitation amendment objectionable.

Elimination of Pricing Notes

KPS also objects to the elimination of the ability to provide pricing notes in the cost model. KPS states that its original proposal included pricing notes for a “significant minority” of the nearly 2800 line items, such as “[DELETED],” “[DELETED],” and “[DELETED].” Comments at 27. KPS contends that it is “difficult-to-impossible” to move its clarifying language from the pricing notes to the pricing narrative because of the hundreds of line items that were subject to more than 25 different kinds of notes. Id. KPS argues that the elimination of offerors’ ability to include pricing notes directly on the cost model will increase the possibility of errors, misunderstanding, and post-award litigation. Protest at 33-34; Comments at 27. KPS contends that the pricing notes ensure a common understanding of the pricing, and that any ambiguity can be resolved before contract award. Comments at 28. KPS also asserts that the elimination of the pricing notes may have disproportionately impacted its competitive position in the procurement. Id. at 26.

DISA states that it removed the pricing notes in order to improve parity between offerors and reduce potential uncertainties of qualified pricing during contract administration. COS/MOL at 39; Supp. MOL at 13-14. In addition, DISA states that although RFP amendment 12 eliminated offerors’ use of pricing notes in the cost model, the amendment did not place a limit on the number of pages for the pricing narrative and therefore any explanation could be included in the narrative. COS/MOL at 38-39. The agency also states that the decision to eliminate pricing notes fairly impacts all offerors,

and is consistent with the RFP's instructions to offerors, which has always provided that assumptions will not be entertained. Id. at 38.

The protester has not demonstrated that the elimination of the pricing notes was unreasonable. Although the parties disagree as to whether the inclusion of pricing notes increases or decreases the possibility of uncertainty, errors, and misunderstandings, we find that the agency could reasonably conclude that the inclusion of hundreds of pricing notes over almost 2800 line items increases the possibility of problems, whether in the evaluation of proposals or the administration of the contract. In this regard, it is within the administrative discretion of an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency, and an offeror should account for this in formulating its proposal. Supreme Foodservice GmbH, B-405400, B-405400.2, Oct. 31, 2011, 2011 CPD ¶ 244 at 10. Moreover, KPS has not provided any explanation as to how its competitive position may be disproportionately impacted by the elimination of pricing notes. In sum, KPS's disagreement with the agency's actions does not in this circumstance provide a basis for sustaining the protest.

The protest is denied.

Susan A. Poling
General Counsel