



Decision

Matter of: Office Design Group

File: B-415411

Date: January 3, 2018

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participated in the preparation of the decision.

DIGEST

1. Protest is timely when filed within 10 days of resolution of an agency-level protest and raises the same issue.
 2. Protest alleging an ambiguity in a solicitation is sustained where the removal of a mandatory contract clause created two reasonable interpretations concerning whether the procurement was set aside for competition among service-disabled veteran-owned small businesses.
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DECISION

Office Design Group (ODG), a service-disabled veteran-owned small business (SDVOSB) concern of Irvine, California, protests the terms of request for proposals (RFP) No. VA701-17-R-0094, issued by the Department of Veterans Affairs (VA) for furniture and installation-related services at the VA's Puget Sound Mental Health and Research Building in Seattle, Washington. The protester alleges that an amendment to the RFP created an ambiguity and that the time given to respond to the solicitation was unreasonably short.

We sustain the protest.

BACKGROUND

On July 13, 2017, the VA posted a pre-solicitation notice to the FedBizOps website notifying prospective offerors of its intent to solicit the required items and services as a total SDVOSB set-aside. Agency Report (AR), Tab 9, VA701-17-R-0094_2 pre-

solicitation, at 2. With that notice, the agency provided draft requirements and drawings and advised potential offerors to expect a truncated response time when the solicitation was posted. Id. at 2. On September 12, 2017, the VA issued the RFP as an SDVOSB set-aside, pursuant to the commercial item acquisition and negotiated procurement procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. RFP at 1. The RFP contemplated the award of a single fixed-price contract. Id. at 44.

The RFP indicated in block 10 of the standard form (SF) 1449 that it was set aside for SDVOSBs, and included several clauses and provisions relating to the set-aside status. As required by Veterans Affairs Acquisition Regulation (VAAR) § 819.7009, the RFP included VAAR clause 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside. Id. at 1, 18. The solicitation also advised offerors that any resulting contract would include that clause as well. Id. at 5. In prescribing the use of this clause, VAAR § 819.7009 states, “[t]he contracting officer shall insert VAAR clause 852.219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside. . . in solicitations and contracts for acquisitions under this subpart.” 48 C.F.R. § 819.7009.

The VAAR clause defines which businesses can qualify as an SDVOSB concern and provides the following general guidance regarding a limitation on subcontractors:

(c) Agreement. A service-disabled veteran-owned small business concern agrees that in the performance of the contract, the concern will comply with the limitation on subcontracting requirements in 13 C.F.R. § 125.6.

48 C.F.R. § 852.219-10(c).

13 C.F.R. § 125.6, in turn, provides as follows with regard to services contracts:

(1) In the case of a contract for services (except construction), [an SDVOSB] will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded.

The RFP included the VAAR clause and required potential offerors to demonstrate in their proposals how the SDVOSB subcontracting limitation above would be met during performance. RFP at 18, 40. This instruction reflected the VAAR clause requirement that at least 50 percent of the cost of personnel for performance of services under the resulting contract be spent on employees of the SDVOSB awardee, or another eligible SDVOSB concern. Id. at 40.

The agency amended the solicitation twice. The first amendment replaced several attachments, updating the furniture specifications and building layouts. AR, Tab 5, RFP Amendment 01. The second amendment, issued on September 18, 2017, made several changes to the terms of the RFP and provided answers to questions posed by potential offerors. AR, Tab 6, RFP Amendment 02. One question noted a

general lack of SDVOSB subcontractors available to perform the installation work, and sought guidance with regard to the requirement that at least 50 percent of the cost for services be spent on employees of an SDVOSB concern. Id. at 4, Question 4. In response, the VA amended the RFP to remove VAAR clause 852.219-10 from the solicitation, as well as removing the portion of the solicitation's instructions requiring offerors to demonstrate how that clause's requirement would be met. Id. at 2. Finally, the amendment extended the due date for receipt of proposals to September 20, 2017 at 2:00 p.m., Eastern time. Id. at 3.

Later on September 18, the president of ODG emailed the contracting officer to point out that the procurement appeared to no longer be limited to competition among SDVOSBs, and to request additional time to respond in light of that change. AR, Tab 7, ODG Email Correspondence, at 3-4. The next day, the contracting officer responded, stating, "[p]lease reference the SF Form 1449 at block 10 which indicates [the RFP] is a[n] SDVOSB set aside. This requirement is funded by [fiscal year 2017] funds and is not available for obligation in [fiscal year 2018]." Id. at 3. Prior to the time set for receipt of offers on September 20, ODG emailed the VA again, seeking clarification about the meaning of the amendment--specifically, whether it was set aside--and again requesting that the closing time be extended. Id. at 2. The contracting officer responded to ODG after the closing time for receipt of proposals had passed, stating that the RFP had closed and asserting that if the solicitation were not set aside, block 10 of the SF 1449 would have clearly been changed to "unrestricted." She also represented that several other changes would have been made if the RFP's set-aside status had been changed from an SDVOSB set-aside. Id. at 1.

On September 29, 2017, ODG filed this protest.

DISCUSSION

ODG argues that by deleting the VAAR clause that is required to be included in solicitations and contracts that are for set-aside for exclusive SDVOSB participation, yet continuing to indicate in block 10 that the solicitation was set aside for SDVOSBs, the agency created an ambiguity around the set-aside status of the procurement. Protest at 5. The protester further alleges that the agency provided inadequate time to respond to the solicitation. Id. at 3-4.

Timeliness

As an initial matter, we address the VA's argument that the protest is an untimely challenge to the terms of the solicitation and should be dismissed on that basis. Req. for Dismissal; MOL at 2-7.

Assuming an ambiguity exists, GAO must also determine whether the ambiguity is patent or latent in order to determine whether the protest was timely filed. RELI Grp., Inc., B-412380, Jan. 28, 2016, 2016 CPD ¶ 51 at 6. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is

more subtle. Id. A patent ambiguity, which is considered to be apparent from the face of the solicitation, must be protested prior to the closing time for receipt of proposals to be considered timely. Id.; 4 C.F.R. § 21.2(a)(1).

In this regard, we are setting aside for later discussion the allegation that this solicitation was ambiguous to just determine whether the protest is untimely. To this end, the agency argues that even if the solicitation were ambiguous, the ambiguity would be a patent one.

As stated above, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals, such as a patent ambiguity, must be filed prior to the closing time. An exception to this rule exists when a protester has filed a timely agency-level protest challenging the solicitation, received an unfavorable answer from the agency, and raises the same issue to our Office within 10 days after receiving initial adverse agency action in response to the agency-level protest. 4 C.F.R. § 21.2(a)(3). The exception applies even where, as here, the subsequent protest to our Office is filed after the solicitation's closing date. Id.; Masai Techs. Corp., B-400106, May, 27, 2008, 2008 CPD ¶ 100 at 2.

In response to the VA's request that our Office dismiss the protest as untimely because it was filed after the closing date for receipt of proposals, ODG asserts that its email to the contracting officer on September 18, 2017, constituted an agency-level protest. Because ODG filed its protest with our Office within 10 days of receiving the contracting officer's resolution of that protest, ODG asserts that this protest is timely under the exception noted above. Response to Req. for Dismissal, at 2.

We agree that ODG's September 18 email was an agency-level protest. A letter (or email) does not have to explicitly state that is intended as a protest for it to be so considered; rather, it must, at a minimum, express dissatisfaction with an agency decision and request corrective action. Masai Techs. Corp., supra at 3. Here, the protester's email expressed confusion regarding whether the procurement was set aside for exclusive SDVOSB participation after amendment 02 was issued, and asked the agency to clarify that point. We understand ODG's request for clarification as a request that the agency correct the ambiguity in the solicitation, and in this regard, as an appeal to the agency to conduct the procurement as an unambiguous set-aside--in short, a request for corrective action. See AR, Tab 5, Email Correspondence at 3-4; see also American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183 at 3.¹ The contracting officer's response the following day addressed the issue raised

¹ The VA cites an earlier decision as support for its contention that the September 18 email should not be considered an agency-level protest. MOL, at 4-6, citing W. Star Hosp. Auth., Inc., B-414198.2, B-414198.3, June 7, 2017, 2017 CPD ¶ 183 at 7. We disagree and note that the facts of the matters are distinguishable. In that decision the email communication merely threatened a GAO protest without requesting relief. Here, the protester requests clarification regarding the set-aside status of the procurement.

by ODG and put forth the agency's position that the procurement was intended to be a set-aside. AR, Tab 5, Email Correspondence at 2-3. Since this protest was filed with our Office 9 days after the contracting officer's response and raises the same issue, it is timely filed.

Ambiguity

Turning to the protester's allegation that the solicitation was ambiguous with regard to whether the procurement was set aside for SDVOSBs, the agency argues that ODG has not shown that the solicitation is ambiguous in this regard because the protester's interpretation of RFP amendment 02 is unreasonable. The agency contends that ODG's interpretation ignores other indicia in the RFP that make clear that the procurement is a total set-aside for SDVOSBs. Supp. Memorandum of Law (MOL) at 2-4. The contracting officer explains that her intent with RFP amendment 02 "was to remove the requirement that 50 percent of the cost of personnel for services be from a SDVOSB, as the cost of any furniture installation would have been ancillary and dwarfed by the cost of the furniture itself."² Supp. Contracting Officer Statement, at 2.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. As a general matter, where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of the provisions; to be reasonable, an interpretation must be consistent with such a reading. ArmorWorks Enters., LLC, B-405450, Oct. 28, 2011, 2011 CPD ¶ 242 at 3. A party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding it reached. RELI Grp., Inc., supra.

On this record, we find that amendment 02 to the RFP contained obvious errors that created a patent ambiguity as to whether the solicitation was set aside for SDVOSB competition. The RFP's set-aside status is susceptible to at least two interpretations. Here, on the one hand, the RFP indicated in SF1449, block 10, that it was set aside for SDVOSBs, and the RFP still included language advising that a resulting contract would include VAAR clause 852.219-1. See RFP at 1, 5; Amendment 02, at 1. On the other hand, an express purpose of Amendment 02 was to remove VAAR clause 852.219-10, as well as a part of FAR § 52.212-1, which instructed offerors to demonstrate in their proposals how they would meet the requirements of the (now removed) mandatory VAAR clause. Given the conflicting information in the solicitation, it is impossible to determine conclusively whether the solicitation was set aside for SDVOSBs; in short, the amended solicitation was patently ambiguous.

² The contracting officer cites no authority to support the agency's ability to except this procurement from the SDVOSB set-aside limitations on subcontracting requirements.

Because we find the solicitation contained a patent ambiguity that was timely challenged, we sustain the protest.³

RECOMMENDATION

We recommend that the VA cancel any contract awarded as a result of the solicitation and revise the solicitation to unambiguously reflect whether the procurement is set aside for SDVOSB competition, consistent with this decision. The revised solicitation should reflect the mandatory clauses and provisions required by the applicable laws and regulations. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for such costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

We sustain the protest.

Thomas H. Armstrong
General Counsel

³ With regard to ODG's complaint concerning the length of time offerors were given to respond to the solicitation, we need not resolve this issue, given the various actions the agency may take in response to this decision's recommendation for corrective action.