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Decision

Matter of: ActioNet, Inc.

File: B-416557.4

Date: February 27, 2019

Gregory H. Petkoff, Esq., and Carla J. Weiss, Esq., Jenner & Block LLP, for the protester.
Damien C. Specht, Esq., Rachael K. Plymale, Esq., and R. Locke Bell, Esq., Morrison & Foerster LLP, for the intervenor.
William B. Blake, Esq., Department of the Interior, for the agency.
John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In taking corrective action in response to bid protest, agency acted within its discretion to limit quotation revisions allowing offerors to update only key personnel where agency reasonably concluded that only this information was needed.

DECISION

ActioNet, Inc. of Vienna, Virginia protests the corrective action taken by the Department of the Interior (DOI), Interior Business Center, Acquisition Services Directorate, in response to ActioNet's protest of DOI's issuance of a task order to ASRC Federal Data Network Technologies (AFDNT) of Beltsville, Maryland, under request for quotations (RFQ) No. 140D0418Q0172, for Defense Healthcare Management Systems sustainment and systems integration support services. ActioNet alleges that the agency's decision to allow offerors to update their quotations to substitute key personnel but not allow any other quotation revisions is unreasonable and constitutes unequal discussions.

We deny the protest.

BACKGROUND

The agency issued the RFQ to holders of the National Institutes of Health Information Technology Acquisition and Assessment Center, Chief Information Officer-Solutions and Partners 3 (CIO-SP3) indefinite-delivery, indefinite-quantity multiple-award contract.

The RFQ, issued pursuant to Federal Acquisition Regulation (FAR) section 16.505, sought quotations for sustainment and systems integration support services for various Defense Medical Information Exchange products. RFQ at 1.¹ The RFQ provided that the task order was to be awarded on a best-value tradeoff basis for a 1-year base period and four 1-year option periods. RFQ at 1-3. The best-value decision was to be based on four technical evaluation factors and price. The four technical evaluation factors, listed in descending order of importance, were: management and technical approach; personnel qualifications; organizational experience; and past performance. Id. at 12.

As relevant to this protest, the RFQ identified eight key personnel positions and the minimum requirements and qualifications for each position. Id. at 7. For each key person, offerors had to provide a resume and letter of commitment, and certify that the key person would be available at the time of award, and for a period of no less than one year. Id. at 7-8.

Five offerors submitted quotations in response to the RFQ.² Following an evaluation, the agency issued a task order to AFDNT with an estimated value of \$89,985,991.87. ActioNet filed a protest with our Office, challenging the agency's evaluation of quotations and organizational conflicts of interest (OCIs). On October 3, 2018, GAO held a conference call and informed the parties that our Office would likely sustain the protest based on the agency's failure to meaningfully evaluate OCIs as required by FAR section 9.504. In response, the agency advised that it intended to take corrective action and review its treatment of the potential OCIs to ensure that all OCIs are avoided, mitigated, or neutralized. The agency also stated that it would review ActioNet's other protest allegations and take any action deemed necessary. GAO dismissed the protest as academic on October 17.³

On October 23, ActioNet sent a letter to the agency regarding the agency's corrective action. Agency Report (AR), Tab 4, ActioNet Letter at 1. In the letter, ActioNet stated that during a transition meeting between ActioNet and AFDNT that occurred before ActioNet filed its protest, ActioNet learned the names of two key personnel that AFDNT had proposed for this task order. Id. These same two people worked for ActioNet's subcontractor on ActioNet's contract to provide sustainment services.⁴ Id. The letter

¹ Citations to the RFQ are to Amendment 4, which was the final amended RFQ.

² The agency found the quotation from one of the offerors to be non-compliant and removed that quotation from the competition.

³ A more detailed description of this protest is contained in ActioNet, Inc.--Costs, B-416557.3, Feb. 4, 2019, 2019 CPD ¶ ____.

⁴ The subject task order consolidated two previous task orders that both ended in fiscal year 2018, one for sustainment services and one for systems integration services.

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informed the agency that ActioNet had “firsthand knowledge” that these two key personnel were no longer available to work for AFDNT on this task order because ActioNet had to replace them on its sustainment services contract after they left the employment of ActioNet’s subcontractor. Id. The fact that AFDNT proposed these two people as key personnel for this task order, and that they are no longer available, is not in dispute.

On October 25, the agency emailed AFDNT to inquire as follows:

Given how much time has lapsed since you submitted the attached quote in response to the subject RFQ, can you confirm whether or not the key personnel proposed in your company’s quote are still available? Please provide a response no later than [close of business (COB)] tomorrow, October 26, 2018.

AR, Tab 7, Key Personnel Update Request - AFDNT. According to the agency, AFDNT responded the next day and stated that some of its key personnel were no longer available, but that AFDNT had additional qualified candidates who were available to work on the procurement. AR, Tab 1, Contracting Officer’s Statement (COS) at 3. The agency also represents that on November 5, AFDNT submitted the resumes and letters of commitment for newly proposed key personnel and that the agency provided this information to the technical evaluation committee for evaluation. Id.

On November 15, the agency emailed ActioNet with the same inquiry:

Given how much time has lapsed since you submitted the attached quote in response to the subject RFQ, can you confirm whether or not the key personnel proposed in your company’s quote are still available? If not, please provide the revised proposed personnel along with the resumes . . . by no later than COB Monday, November 19.

AR, Tab 5, Key Personnel Update Request - ActioNet. The agency did not request any additional information from either offeror.⁵ On November 19, ActioNet informed the agency that it had no changes to its key personnel and that all key personnel would be available if award was made to ActioNet. AR, Tab 6, ActioNet Response to Key

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ActioNet was an incumbent on the sustainment services task order and performed this work on a contract awarded during the pendency of the protest.

⁵ The agency also stated that it did not contact the other two offerors regarding their key personnel because it concluded that “no changes to key personnel would result in either offeror presenting the best value unless both ActioNet or AFDNT failed to provide adequate key personnel.” AR, Tab 1, COS at 3, n.1.

Personnel Update Request. That same day, ActioNet filed its protest with our Office challenging the agency's corrective action.⁶

DISCUSSION

ActioNet argues that the agency's limitation on quotation revisions to allow only for substitutions to key personnel was improper and constituted unequal and misleading discussions. The agency counters that it could properly limit quotation revisions to implement its corrective action.⁷ For the reasons discussed below, we deny ActioNet's protest.

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 quotations as they see fit, including portions of their quotations which were not subject to discussions; an agency, in conducting discussions to implement corrective action, may, however, reasonably limit the scope of revisions. See Sys. 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 quotation 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; NCS Techs., Inc., B-413500.2, Feb. 14, 2017, 2017 CPD ¶ 123 at 6.

As noted above, the agency took corrective action in response to GAO informing the parties that our Office would likely sustain ActioNet's initial protest because the agency failed to meaningfully evaluate OCIs. In its response to this protest, the agency

⁶ Because the awarded value of the task order exceeded \$10 million, this protest is within our jurisdiction to consider protests of task orders placed under civilian agency indefinite-delivery, indefinite-quantity multiple award contracts. See 41 U.S.C. § 4106(f)(1)(B).

⁷ The agency also argues that ActioNet's protest is premature because it alleges "errors in the discussion process" and is raised prior to award. Agency Memorandum of Law (MOL) at 2. The agency's premise is incorrect. ActioNet is not alleging that discussions were not meaningful or otherwise challenging the substance of discussions. Rather, ActioNet challenges the limitations the agency imposed on the scope of quotation revisions. We view this as a challenge to the terms for submitting revised quotations-- which, like solicitation terms, had to be protested before the next closing time. See McKean Def. Grp.-Info. Tech., LLC, B-401702.2, Jan. 11, 2010, 2010 CPD ¶ 257 at 3 n.3 (protest filed before award was not premature where protester objected to agency's decision that the corrective action would include discussions).

explains that as part of its corrective action it determined that no additional information from the offerors was needed to fully evaluate OCIs or make a new award decision. AR, Tab 1, COS at 3. However, the agency also states that “[d]ue to the amount of time that had elapsed between the award on June 14, 2018 and the corrective action, the [contracting officer] determined that some key personnel may have become unavailable and planned to ask both AFDNT and ActioNet for updated key personnel.” Id. Accordingly, the agency contacted AFDNT and ActioNet to inquire whether their respective key personnel were still available and, if not, provide them each the opportunity to submit new key personnel. The agency argues that these limited quotation revisions allowing only for key personnel substitutions were proper and appropriate given the passage of time resulting from procurement delays.

ActioNet argues that DOI requested the limited quotation revisions only after ActioNet informed the agency about the unavailability of AFDNT’s key personnel, and not as a result of the agency’s independent determination that the amount of time that had passed between award and the corrective action might have affected the availability of initially proposed key personnel. Protester’s Comments at 3. In this regard, the record shows that the agency requested confirmation from AFDNT about the availability of its proposed key personnel just two days after it received the letter from ActioNet explaining that two of AFDNT’s key personnel were no longer available. The record also shows that the agency waited three weeks before it requested the same confirmation from ActioNet regarding its key personnel. ActioNet asserts that this resulted in unequal or misleading discussions because AFDNT was allowed to correct a defect in its quotation, but ActioNet was not provided any opportunity to revise other sections of its quotation and improve its chances of receiving an award. Protest at 5; Protester’s Comments at 2-3.

On this record, we find that the limitations on quotation revisions were reasonable. In support of its position, DOI points to our decision in Consolidated Eng’g Servs., Inc., supra, in which the agency allowed for limited proposal revisions to substitute key personnel when implementing corrective action based on an issue with the agency’s past performance evaluation. MOL at 3. We found the approach in Consolidated Eng’g reasonable, “since the apparent premises underlying it--that the delay resulting from the protest well may have affected the availability of the originally proposed key personnel, and that the evaluation should be based on currently available key personnel to the extent possible--appear valid.” Consolidated Eng’g Servs., Inc., supra at 4. The same is true here. Regardless of the agency’s reasons for requesting the limited quotation revisions, the passage of time affected the availability of one offeror’s key personnel, and it was reasonable for the agency to allow offerors to update their key personnel so that the evaluation could be based on currently available key personnel. Moreover, both offerors were provided the same chance to update their key personnel.⁸

⁸ The protester notes that it had only four days to respond to the agency’s request regarding key personnel while AFDNT was allowed 11 days to respond, and argues that if the agency decided that the passage of time required confirming the availability of key
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Thus, while permitting limited quotation revisions allowed AFDNT to replace key personnel that had become unavailable, and thus address a deficiency in its quotation, ActioNet had the same opportunity to replace key personnel if it needed to do so. In the context of implementing corrective action, the agency was not required to provide ActioNet, or any other offeror, with the opportunity to revise other parts of their quotations. The agency's decision to limit quotation revisions here also reflected DOI's sensitivity to the fact that ActioNet had been provided with AFDNT's original price during the debriefing, as well as a summary of the agency's technical evaluation of ActioNet's quotation. In that sense, there was nothing improper with the agency's decision to limit quotation revisions to avoid creating a competitive advantage that would provide a benefit to the protester--which knew from its debriefing the technical areas in its quotation that it needed to improve--but not to other offerors. For these reasons, we do not find that the agency's actions were improper, or constituted unequal or misleading discussions.

ActioNet also argues that the agency can limit the scope of quotation revisions in the context of corrective action only "if the limited scope is all that is necessary to remedy the procurement impropriety that was the basis of the corrective action," citing Deloitte Consulting, LLP, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355 at 6.⁹ Protest at 4. In this regard, ActioNet argues that since the availability of key personnel was not at issue in the initial protest, it was improper for the agency to limit quotation revisions only to the substitution of key personnel. ActioNet misinterprets our decision in Deloitte. Agencies can restrict quotation revisions when taking corrective action "so long as it is reasonable

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personnel, the agency should have requested the information from the offerors at the same time and provided a common response date. Protester's Comments at 3. While we think this approach would have been preferable, ultimately, both offerors had a fair opportunity to respond to the agency's request, which is what is required under FAR section 16.505(b)(1). Moreover, ActioNet confirmed that all of its key personnel were still available so it would be unable to demonstrate that the shorter response time was prejudicial.

⁹ ActioNet also argues that because the agency's request for updated key personnel does not correct a procurement infirmity, it constitutes opening discussions, which, the protester contends, should include permitting revisions to any part of the quotation, citing YWCA of Greater Los Angeles, B-414596, July 24, 2017, 2017 CPD ¶ 245. Protest at 5. In YWCA, we concluded that where an offeror's key personnel became unavailable after receipt of final proposals but before award was made, the agency could do one of two things: evaluate the proposal as is, or open discussions with offerors and allow for revisions to any part of the proposal. YWCA, supra, at 2. Here, the key personnel became unavailable after--not before--award, and the agency limited quotation revisions in the context of implementing corrective action. Thus, this case involves a different set of facts than what occurred in YWCA.

in nature and remedies the established or suspected procurement impropriety.” Deloitte Consulting, LLP, supra; see also NCS Techs., Inc., supra. This does not restrict agencies to limiting proposal revisions only if those limitations are necessary to correct a procurement impropriety that served as the basis for corrective action. Rather, the agency can limit proposal revisions to remedy any “established or suspected procurement impropriety.”¹⁰ The agency sought to avoid any impropriety by confirming the availability of offerors’ key personnel and requesting updates if necessary, so the agency could make award on the basis of up-to-date quotations. These actions were reasonable and consistent with relevant and applicable decisions of our Office.

The protest is denied.

Thomas H. Armstrong
General Counsel

¹⁰ In Deloitte, we found that the agency’s restriction on proposal revisions to allow only for substitution of key personnel was improper because it also prohibited offerors from revising related areas of their proposals on which the key personnel substitutions had a material impact. Deloitte Consulting, LLP, supra at 6-7. That is not the case here. Indeed, ActioNet has conceded that the substitution of new key personnel here would have no material impact on other parts of the quotations. Protester’s Comments at 4.