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Decision

Matter of: Analytical Solutions by Kline, LLC

File: B-417161; B-417161.2

Date: March 12, 2019

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John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a solicitation provides for two different types of certifications through which an offeror may meet a quality certification requirement, protest challenging only one type of certification as unduly restrictive of competition is dismissed.
 2. Protest challenging solicitation as unduly restrictive because it requires offerors to demonstrate experience through contract references under which they have performed for two or more years is denied where the protester's argument is based on a misinterpretation of the solicitation.
 3. Protest challenging a solicitation term as unduly restrictive where the term limits offerors to submitting only three contract references to show past performance is denied where the agency has shown a reasonable basis for this limitation.
 4. Protest that the agency engaged in improper bundling of contract requirements is dismissed as untimely where the agency's intent to combine contract requirements was apparent from the terms of the solicitation and the protester failed to challenge this aspect of the solicitation until after the closing time for receipt of proposals.
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DECISION

Analytical Solutions by Kline, LLC (ASK), of Cleveland, Ohio, protests the terms of request for proposals (RFP) No. 28321319R00000004, issued by the Social Security Administration (SSA) for information technology (IT) support services. ASK asserts that

the terms of the RFP are overly restrictive of competition, and that the agency engaged in improper bundling of contract requirements.

We deny the protest in part and dismiss it in part.

BACKGROUND

The agency issued the RFP as a small business set-aside on October 4, 2018, seeking proposals for enterprise small business IT support services (ESBITSS). Agency Report (AR), exh. 1, RFP at 1.¹ Contract awardees are expected to provide “the expertise, technical knowledge, IT support personnel, and other related resources necessary to support the entire spectrum of IT support at SSA” for the following four task areas: infrastructure, telecommunications environment, and help desk support; software engineering, systems security, and management support; database and data administration; and lifecycle activities and development operations. RFP, Statement of Work (SOW), at 108. In issuing the ESBITSS RFP, the agency combined and replaced three existing contract vehicles: a blanket purchase agreement (BPA) for IT support services; an indefinite-delivery, indefinite-quantity (IDIQ) contract for IT engineering support services; and a single-award contract for help-desk initiative support services. RFP, Amend. 2, ESBITSS Overview Document, at 314.

The RFP stated that the agency would evaluate proposals under the following four phases: (1) SSA accessibility requirements and required quality certification; (2) relevant experience requirements; (3) detailed corporate experience; and (4) past performance. RFP, Amend. 4, § E2-3, at 413-15, 420-23. Proposals were to be evaluated on a pass/fail basis for the first two phases; if a proposal did not meet the requirements of either phase 1 or phase 2, it would not be evaluated further or considered for award. Id. at 413-14. Under phase 3, the agency would evaluate the breadth and depth of the offeror’s experience in the four task areas identified in the SOW. Id. at 414. Offerors that reached phase 4 would be evaluated for past performance. Id. at 415. The RFP stated that final awards would be made on a best-value tradeoff basis where the past performance factor would be more important than price. Id. at 427-28. The RFP contemplated the award of multiple IDIQ contracts. Id. at 427.

As relevant to this protest, under phase 1, offerors were to provide “either a Capability Maturity Model (CMM/CMMi) or International Organization for Standardization (ISO) certification.” Id. at 413. Under phase 2, offerors had to provide three references demonstrating the following, in pertinent part:

Experience providing IT support services to a federal government agency.
The experience evaluated at phase 2 must be on-going or have been

¹ References to RFP page numbers are to the SSA’s Bates numbering in the AR exhibit for the RFP.

completed within 5 years prior to the solicitation closing date. Additionally, the contractor must have performed for at least two years under the referenced acquisition. If the referenced acquisition is ongoing, the contractor must have completed two years of performance prior to the solicitation closing date.

A dollar value of at least \$2 [million] for each reference must have been obligated to the referenced acquisition by the closing date of this solicitation

Id. at 413-14. The RFP noted that “[f]or this solicitation, the term ‘acquisition’ as it relates to references of experience may include BPAs, contracts, [General Services Administration (GSA)] task orders, orders against other [governmentwide acquisition contracts (GWACs)], and open market task orders.” Id. at 414. The RFP provided that the SSA would evaluate the same three references used in phase 2 for the detailed corporate experience in phase 3, and past performance in phase 4. Id. at 414-15.

Proposals were due on December 4, 2018. The agency states that it received over 50 proposals. That same day, ASK timely filed this protest with our Office, challenging the terms of the solicitation.

DISCUSSION

ASK argues that the RFP requirements regarding CMMi certification, references demonstrating relevant experience, and the number of references offerors could submit to show past performance, are overly restrictive of competition and preclude a significant number of small businesses from submitting proposals.² In a supplemental protest, ASK asserts that the agency engaged in improper bundling of contract requirements in issuing the ESBITTS RFP. For the reasons discussed below, we deny the protest in part and dismiss it in part.

Overly restrictive solicitation terms

Agencies must specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies’ legitimate needs or as otherwise authorized by law. 41 U.S.C. § 3306(a). It is within a contracting agency’s discretion to determine its needs and the best method to accommodate them, and we will not question an agency’s determination of its needs unless that determination has no reasonable basis.

² ASK raises other arguments, including that the agency had a preference for large business teams or joint ventures, and that the solicitation terms were vague and poorly defined. Protest at 2; Supp. Protest and Comments at 18-22. Although our decision does not specifically address every argument, we have considered all of the protester’s arguments and find that they do not provide a basis upon which to sustain the protest.

Salient Fed. Sols., Inc., B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 2. 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. LexisNexis, B-413612, Nov. 29, 2016, 2016 CPD ¶ 356 at 4-5; eReceivables, Inc., B-416773, Dec. 12, 2018, 2018 CPD ¶ 423 at 5. Where an agency reasonably identifies its needs and allows offerors the opportunity to meet those needs, the fact that a solicitation's requirements may be burdensome or even impossible for an offeror to meet does not make them objectionable, if the requirements properly reflect the agency's needs. TransAtlantic Lines, LLC, B-411846.2, Dec. 16, 2015, 2015 CPD ¶ 396 at 9; eReceivables, Inc., *supra*.

The protester argues that the agency's requirement that offerors provide a CMMi certification to pass phase 1 is "very limiting" and would eliminate the vast majority of small businesses from competing. Protest at 10-14. The agency counters that the solicitation provided that offerors could provide either a CMMi or an ISO certification to meet the requirements for phase 1, and since ASK has not challenged the ISO certification requirement, it has not shown that the solicitation is overly restrictive. We agree. In its protest, ASK addressed only the allegedly limiting effect that the CMMi certification requirement would have on competition, but did not allege that the ISO certification option was similarly restrictive. Because there was an alternative option to CMMi certification that offerors could utilize to meet the phase 1 requirements, the CMMi certification requirement itself did not render the terms of the RFP overly restrictive of competition. Accordingly, ASK's contention that the CMMi certification requirement for phase 1 was restrictive is dismissed for failing to state a valid basis of protest.³

ASK also asserts that the requirement that offerors demonstrate their relevant experience using acquisition references where the offeror has "performed for at least two years" under each reference is "unnecessarily restrictive." Protest at 15-16. This claim is based on the protester's understanding that the reference contracts must be for "multi-year" periods of performance, rather than a single year of performance. In other words, the protester interprets the solicitation as requiring offerors to submit references for contracts they performed for two or more consecutive years, such as a base period that lasts for two years. The protester argues that this is overly restrictive, since many contracts do not last for more than one year, and, particularly, since the task orders the

³ In its comments on the agency report, the protester concedes that it focused only on the CMMi certification in its protest but that "the exact same issues apply to ISO." Supp. Protest and Comments, attach. 1, at 6. However, the protester was aware at the time it filed its initial protest that the RFP permitted offerors to provide either a CMMi or an ISO certification and therefore this challenge to the ISO certification is untimely. See 4 C.F.R. § 21.2(a)(1) ("[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to . . . the time set for receipt of initial proposals shall be filed prior to . . . the time set for receipt of initial proposals").

agency ultimately intends to issue under the resultant IDIQs for this procurement would not exceed one year. Id. at 15.

The agency counters that the protester's interpretation of the solicitation is incorrect and that the solicitation does not require "multi-year" contract references. Rather, the agency explains, the solicitation "requires that the contractor has performed for at least two years under the referenced acquisition without specifying whether such acquisition had a multi-year period of performance or a base year with option years (or some other structure that would provide a two-year experience under a single acquisition effort)." AR at 23. Thus, according to the agency, a reference to an acquisition under which the offeror has performed for two year-long option periods, or a series of task orders that cumulatively accounted for two or more years of performance, would meet the solicitation requirements. Id. at 24.

In response, ASK argues that the agency's interpretation is inconsistent with the SSA's response to the following question, incorporated into the RFP by amendment, regarding the contract references:

Question 4: If the agency we worked for only does one-year contract awards due to single year funding, and they awarded us an initial 1-year contract (software development) and a 2nd 1-year consecutive contract for follow-on work ([operations and maintenance]) for the same project and system, does this past performance meet the requirement . . . "the contractor must have performed for at least two years under the referenced contract/BPA."

Answer: No, this would be considered two 1-year contracts.

Supp. Protest and Comments at 9 (quoting RFP, Amend. 1, Questions and Answers at 277). ASK also states that if the RFP "had been written in accordance with [SSA's] current interpretation" with respect to contract references, ASK would have been eligible to submit an offer.⁴ Id. at 10.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Sikorsky Aircraft Corp., B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 11. If a protester and agency disagree over the actual meaning of solicitation language, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the

⁴ ASK also asserts as a separate supplemental protest ground that the agency's interpretation of this requirement shows that the agency intended to evaluate offers in a manner not in accordance with the stated evaluation criteria. Supp. Protest and Comments at 9-10. Because we conclude that the agency's interpretation is correct, this protest ground has no merit.

solicitation. See Level 3 Commc'ns LLC, B-412854 et al., June 21, 2016, 2016 CPD ¶ 171 at 7.

Here, the terms of the RFP are consistent with the agency's interpretation. As the agency points out, in describing the types of contract references an offeror could use to meet the experience requirement under phase 2, the RFP stated that the offeror "must have performed for at least two years under the referenced [a]cquisition." RFP, Amend. 4 § E2-3, at 413. The RFP defined the term acquisition in the context of references for experience as "includ[ing] BPAs, contracts, GSA task orders, orders against other GWACs, and open market task orders."⁵ Id. Thus, by referring to an acquisition, as opposed to a contract, the RFP indicated that an offeror could rely on its performance under a variety of different types of acquisition vehicles, including BPAs, task orders, and other similar types of acquisitions.

The agency points to its responses to other questions as support for its interpretation of the solicitation. Supp. AR at 14-15. For example, in response to a question as to whether the agency would "consider . . . experiences that are between \$500[,000] to \$2 [m]illion across task orders," SSA responded "[i]f the task orders are against a single [c]ontract that the contractor has performed for at least 2 years with a total dollar value of at least \$2 million, then it is acceptable." RFP, Amend. 1, Questions and Answers at 277. Similarly, in response to a question regarding whether a referenced task or call order must have two years of performance, the agency stated "[i]f your [r]eference is the IDIQ or BPA you can use experience, past performance, and ratings from all awarded orders to satisfy the 2 years and 2 million requirements." RFP, Amend. 2, Questions and Answers at 287. We agree with the agency that these responses show that the RFP clearly did not require offerors to use "multi-year" contracts as contract references, and instead allowed for references to acquisitions under which the offeror's total performance accumulated to two or more years.

The protester acknowledges but does not address these responses, and instead continues to insist that the agency's response to question 4 is inconsistent with the interpretation the SSA provides in the agency report. Protester Supp. Comments at 10. We disagree. Question 4 contemplated performance under two separate contracts--a one-year contract for software development, and a separate one-year contract for operations and maintenance work. This would amount to two separate acquisitions as that term was defined in the solicitation--since the RFP expressly included "contracts"

⁵ The agency notes that the RFP initially stated that the offeror must have performed for two years "under the referenced contract/BPA," but the SSA amended the RFP to replace "referenced contract/BPA" with "referenced [a]cquisition" and added the definition of what an "acquisition" encompassed for purposes of experience references. Supp. AR at 13-14; see also RFP, Amend. 3, Questions and Answers at 322. The agency asserts that this amendment clarified that offerors could use their cumulative performance under BPAs, task orders, or similar types of acquisitions to meet the two-year performance requirement.

as an example of an “acquisition”--regardless of whether the services provided under the two contracts were for the same project or system. Thus, under the plain terms of the solicitation, the agency correctly responded that the hypothetical contracts proposed in question 4 would not meet the requirement to perform for at least 2 years under a single referenced acquisition. The agency’s response to this question is entirely consistent with the RFP.

ASK’s argument that the contract reference requirement is unduly restrictive is based on its misinterpretation of this requirement, discussed above, and its belief that the requirement--as ASK interpreted it--would preclude small business competition.⁶ Moreover, ASK has acknowledged that it could have submitted a proposal under the agency’s correct interpretation of the requirements. ASK has not met the standard to show an undue restriction on competition, *i.e.*, it has not shown that the actual requirement, accurately interpreted, was not reasonably necessary to meet the agency’s needs. Accordingly, this protest ground is denied.

Finally, the protester argues that “[a]n overwhelming majority of interested small businesses will have no opportunity to compete” because the RFP limits offerors to submitting only three contract references to meet the solicitation requirements. Protest at 17-18. In the protester’s view, the combination of this small permissible number of references with the RFP’s “bundling of 193 widely disparate” required skills and other performance elements will preclude most small businesses from being able to demonstrate the required level of experience. In response, the agency explains that it limited offerors to only three contract references to “minimize the burden on small businesses having to provide detailed information for each referenced contract” and to “not unduly disadvantage smaller-sized businesses that may not have a vast array of experience by competing with those able to submit significantly more than three relevant references.” AR at 10. The agency also states that limiting offerors to three references would promote efficiency in its evaluation of an anticipated high number of proposals that would be submitted in response to the RFP. *Id.* Additionally, the agency points out that more than 50 small businesses submitted proposals in response to the RFP. *Id.* at 22.

We find the agency’s reasons for limiting offerors to three contract references for past performance reasonable. Minimizing the burden on small businesses and seeking to avoid disadvantaging smaller-sized businesses are both reasonable bases to limit the

⁶ ASK argues in the alternative that there was a latent ambiguity in the solicitation regarding the type of contract reference an offeror could use that was made known for the first time in the agency report. Protester’s Supp. Comments at 10. A solicitation is not ambiguous unless it is susceptible of two or more reasonable interpretations. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 7. Because we find that the plain language of the RFP is clear and not susceptible of two or more reasonable interpretations, ASK’s alternative argument is denied.

number of contract references offerors may submit. The protester does not specifically rebut the agency's rationale for the limitation, but rather focuses on the fact that there were a number of questions submitted regarding the past performance solicitation requirements. Supp. Protest and Comments at 13-18. However, the fact that potential offerors submitted a high number of questions to the agency regarding the RFP requirements is not evidence that the requirements were unduly restrictive. To the contrary, despite all the questions, over 50 offerors have submitted proposals, which indicates that limiting offerors to 3 contract references was not unduly restrictive of competition and did not result in an overwhelming majority of small businesses having no opportunity to compete. Moreover, the fact that a particular prospective offeror is unable to compete under a solicitation that reflects the agency's needs does not establish that the solicitation is unduly restrictive. eReceivables, Inc., supra. This protest ground is denied.

Improper Bundling

In a supplemental protest filed after receiving the agency report, and after closing time for receipt of initial proposals, ASK argues for the first time that the agency failed to follow the procedural requirements to justify bundling three existing contracts under the single ESBITSS solicitation. Supp. Protest and Comments at 2. Specifically, ASK asserts that the agency did not conduct the proper market research or acquisition planning for bundling contracts as required by Federal Acquisition Regulation (FAR) section 7.107 and other applicable regulations. Id. at 3-9. The agency counters that this protest ground is untimely because ASK knew or should have known at the time it filed its original protest that the ESBITSS solicitation combined the requirements of several existing contracts.⁷ Supp. AR at 3-5. In this regard, the agency states that RFP amendment 2 included an ESBITSS overview document that informed offerors that this procurement combined and replaced two existing multiple-award contracts and one stand-alone contract. Id. at 4; see also RFP, Amend. 2, ESBITSS Overview Document, at 314. In response, ASK asserts that its protest is timely, claiming that (1) it alleged that the agency improperly bundled the solicitation in its initial protest; (2) the agency acknowledged this argument and responded to it in the agency report; and (3) in that response, the agency failed to show that it complied with the procedural regulations to bundle or consolidate requirements. Protester's Supp. Comments at 3-4.

We conclude that this protest ground is untimely. ASK knew or should have known that the agency was combining three different requirements with this procurement when SSA issued RFP amendment 2 that included the ESBITSS overview document

⁷ The agency also states that the ESBITSS RFP consolidated, and did not bundle, previously existing contract requirements. Supp. AR at 6-7. The FAR defines consolidation of contracts differently from bundling of contracts. See FAR § 2.101. Because we find that ASK's protest ground regarding the consolidation or bundling of contract requirements is untimely, we need not address whether the agency consolidated or bundled the contract requirements.

informing offerors that the RFP combined the requirements of several existing contracts. RFP, Amend. 2, ESBITSS Overview Document, at 314. Thus, because the agency's decision to combine these existing contracts was clear from the terms of the RFP, ASK had to assert this ground in its initial protest for its challenge to be timely. 4 C.F.R. § 21.2(a)(1). We find that ASK did not raise this ground in its initial protest.

ASK's claim that it raised this ground in its initial protest relies on the statement that "ESBITSS is a large solicitation, which bundles 193 disparate 'unique identifiers' (technologies, tools, skills, tasks)." Protester's Supp. Comments at 3 (citing Protest at 10). This statement merely notes that the agency bundled certain "identifiers" but does not allege that the agency improperly bundled existing contract requirements. Simply using the term "bundles" in describing the RFP requirements does not equate to an allegation that such bundling was improper. Furthermore, while ASK's initial protest included some additional references to "bundled" requirements, they were in the context of alleging that other solicitation requirements were overly restrictive. For example, as discussed above, ASK stated that "[a]n overwhelming majority of interested small businesses will have no opportunity to compete given the combination of bundling of 193 widely disparate 'unique elements' . . . with the fact that [three] (3) and [only three] (3) past performance references may be used." Protest at 17. Here again, there is no allegation that the bundling was improper; rather the protester argues that the limitation to three references was too restrictive given the wide range of work the RFP covered. Indeed, ASK's protest specifically states that its concerns "largely fell into three categories: CMMI / certification, references / past performance, and a preference for large business teams/joint ventures/mentor." Protest at 2. Noticeably absent is any claim that the agency improperly bundled requirements.

In short, ASK did not allege in its initial protest that the agency engaged in improper bundling even though it knew from the RFP the basis for this protest ground.⁸ As a result, this ground is dismissed as untimely.

Thomas H. Armstrong
General Counsel

⁸ ASK's claim that it did not know until it received the agency report that the agency failed to follow the procedural requirements for bundling contracts is unconvincing. ASK did not have to wait until it received the agency report to make this allegation. Indeed, once it learned from the RFP amendment that the agency was combining three existing contracts into the ESBITSS procurement, ASK had all the information it needed to allege that the agency was engaging in improper bundling.