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Decision

Matter of: Insero Corporation

File: B-417791, B-417791.3

Date: November 4, 2019

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Colonel Patricia S. Wiegman-Lenz, and Christopher M. Judge, Esq., Department of the Air Force, for the agency.

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DIGEST

Solicitation for information technology services which provides for award based on a tradeoff between price and past performance does not violate statute which requires agencies of the Department of Defense to avoid using lowest-priced, technically acceptable award process or criteria to the maximum extent practicable.

DECISION

Insero Corporation, of Vienna, Virginia, protests the terms of request for quotations (RFQ) No. 1369887, issued by the Department of the Air Force for information technology (IT) and cybersecurity services. Insero asserts that the agency is using lowest-priced, technically acceptable (LPTA) award criteria in violation of section 813(c) of the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, 2270-71 (2016) (codified at 10 U.S.C. § 2305 note), as amended by the NDAA for Fiscal Year 2018, Pub L. No. 115-91, § 822, 131 Stat. 1283, 1465 (2017) (section 813(c)).

We deny the protest.

BACKGROUND

The agency issued the solicitation on July 9, 2019, to holders of the General Services Administration (GSA) 8(a) Streamlined Technology Acquisition Resources for Services (STARS) II contracts, which are multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts for various information technology services and service-based

solutions. The RFQ seeks quotations to provide personnel, services, and technical and management support to operate and maintain all functional servers and multi-user computer systems at several Air Force installations. The RFQ contemplates the award of a fixed-price task order with a 1-year base period, three 1-year option periods, and one 6-month option period. Agency Report (AR), Tab 7, RFQ, at 2, 62-66.

The solicitation provides that quotations will be evaluated using technical acceptability, past performance, and price factors. RFQ at 2-6. The technical acceptability factor contains two subfactors: (1) management approach, and (2) staffing and retention plan. Id. at 3-4. The agency will first rank quotations according to price, from lowest to highest, and will evaluate the five lowest-priced quotations as either technically acceptable or unacceptable, reserving the right to evaluate additional quotations for technical acceptability if deemed to be in the best interest of the government. Id. at 2-3. The agency will evaluate only technically acceptable quotations under the past performance factor. Id. at 5.

Past performance is to be rated for recency, relevancy, and quality. Id. at 5-6. Past performance must be considered recent to be evaluated for relevancy and quality. Id. at 5. The RFQ states that relevancy will be evaluated as relevant or not relevant and quality will be assigned ratings of very good, satisfactory, neutral, or unsatisfactory. Id. at 6. Based on the evaluation of individual performance efforts, the agency will assign a performance confidence assessment rating of substantial confidence, satisfactory confidence, no confidence, or unknown confidence. Id. at 6-7.

The RFQ also states that the agency will issue the task order on a best-value tradeoff basis, as follows:

For this procurement, the Best Value determination will be made based on a tradeoff approach. The Government will award a task order resulting from the RFQ to the responsible offeror whose quote is responsive to the RFQ, technically acceptable and considered to be [the] Best Value based upon a price/past performance trade-off. . . . When evaluated, past performance will be considered equal to price. Tradeoff considerations may result in the determination that it is in the best interest of the Government to consider award to other than the lowest priced quote or other than the highest rated offeror in past performance. Only technically acceptable quotes are eligible for award.

Id. at 2.

Proposals were due July 29, 2019. AR, Tab 8, RFQ amend. 01, at 2. On July 25, Inerso filed a protest with our Office arguing that the terms of the solicitation violate statute.¹

DISCUSSION

Inerso protests that the agency is violating the NDAA for Fiscal Year 2017 by using LPTA source selection criteria to make its award determination. Protest at 7-12. The protester argues that section 813(c) of the NDAA for Fiscal Year 2017 requires DOD to avoid using LPTA criteria when procuring the services sought under this RFQ-- information technology and cybersecurity services. *Id.* at 9, 11-12. Inerso argues that the agency is using LPTA criteria in the solicitation because the RFQ fails to provide for a tradeoff between price and technical factors.

Section 813 of the NDAA for Fiscal Year 2017 provides, in relevant part:

Sec. 813. USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE SOURCE SELECTION PROCESS.

(a) STATEMENT OF POLICY.—It shall be the policy of the Department of Defense to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the agency the benefits of a cost and technical tradeoff.

(b) REVISION OF DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT.— . . . the Secretary of Defense shall revise the Defense Federal Acquisition Regulation Supplement to require that . . . lowest price technically acceptable source selection criteria are used only in situations in which—

(1) the Department of Defense is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers;

(2) the Department of Defense would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal;

(3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;

(4) the source selection authority has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder

¹ While the task order will be in support of a Department of Defense (DOD) organization, STARS II is a civilian agency IDIQ contract awarded by GSA. As such, the protest is within our Office's jurisdiction because the value of the order to be issued exceeds \$10 million. See 41 U.S.C. § 4106(f); Analytic Strategies LLC, Gemini Indus. Inc., B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

would not result in the identification of factors that could provide value or benefit to the Department;

(5) the contracting officer has included a justification for the use of a lowest price technically acceptable evaluation methodology in the contract file; and

* * *

(c) AVOIDANCE OF THE USE OF LOWEST PRICE TECHNICALLY ACCEPTABLE SOURCE SELECTION CRITERIA IN CERTAIN

PROCUREMENTS.—To the maximum extent practicable, the use of lowest price technically acceptable source selection criteria shall be avoided in the case of a procurement that is predominately for the acquisition of—

(1) information technology services, cybersecurity services, . . . audit or audit readiness services, or other knowledge-based professional services;

(2) personal protective equipment; or

(3) knowledge-based training or logistics services. . . .

Pub. L. No. 114-328, § 813. In essence, the agency asserts that its solicitation does not violate section 813(c) because it does not utilize lowest-priced, technically acceptable source selection criteria as the basis for award. The agency states that Federal Acquisition Regulation (FAR) section 15.101-2, Lowest Price Technically Acceptable Source Selection Process, should be used to define LPTA criteria. Memorandum of Law (MOL) at 4-5. That section of the FAR states that the “lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.” FAR § 15.101-2(a). The regulation further states that “[w]hen using the lowest price technically acceptable process, the following apply:” (1) award is based on the offer with the lowest evaluated price that meets or exceeds the acceptability standards for non-cost factors set forth in the solicitation; (2) if past performance is used as an evaluation factor, no comparative assessment is conducted; and (3) tradeoffs are not permitted. *Id.* § 15.101-2(b). The agency asserts that it is not using LPTA criteria to make its award determination because it is performing a best-value tradeoff between price and past performance. MOL at 5.

Insero agrees that tradeoffs are not permitted between price and past performance under the LPTA source selection process described in FAR section 15.101-2.

Comments at 8. Insero argues that Congress, with section 813(c), meant to prohibit the use of LPTA source selection criteria, which Insero asserts is different than the LPTA source selection process described in FAR section 15.101-2. *Id.* at 5-8. Insero notes that while the title of section 813 is “Use of Lowest Price Technically Acceptable Source Selection Process,” which mirrors FAR section 15.101-2, Lowest Price Technically Acceptable Source Selection Process, the agency is obligated by section 813(c) to avoid using LPTA criteria. Protest at 10; Comments at 5. In Insero’s view, the difference between the title of the section, and the agency’s obligation under section

813(c), indicates that Congress viewed LPTA process and LPTA criteria differently. Comments at 5. Under Insero's interpretation, in procurements for IT services, the agency must affirmatively use a tradeoff between price and technical factors as the basis for award and cannot eliminate offers without making a tradeoff between technical factors and price. Id. at 6. Insero argues that the RFQ here therefore violates section 813(c) because it uses LPTA criteria by ranking offerors by price and evaluating the five lowest-priced offerors for technical acceptability. Protest at 10-11.

There is no dispute that the Air Force is conducting this procurement using technical acceptability and price as elements in a price versus past performance tradeoff, but we conclude that the agency did not violate section 813(c) of the Fiscal Year 2017 NDAA. Our analysis begins with the interpretation of the statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the 'language of the statute.'"). In construing the statute, "[t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.'" Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2001) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). In this regard, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009). If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). An agency's interpretation must be reasonable and based on a permissible construction of the statute; such a construction need not be the only one the agency permissibly could have adopted. Id. at 843.

While the title of section 813 is "[LPTA] Source Selection Process," the directive in 813(a) of the NDAA for Fiscal Year 2017 established a policy that DOD should avoid using LPTA source selection criteria in circumstances that would deny the agency the benefits of a cost and technical tradeoff. Pub. L. No. 114-328, § 813(a). Further, in defining the situations in which agencies may use LPTA source selection criteria, section 813(b) refers to technical requirements and technical approaches (and not past performance).²

²Section 813(b) lists eight situations where DOD is permitted to use LPTA criteria. For example, under section 813(b), DOD may use LPTA criteria where it would realize no or minimal value from a contract proposal exceeding minimum technical or performance requirements. Pub. L. No. 114-328, § 813(b)(2). According to Insero, the term "technical requirements" signals Congressional intent to restrict agencies from using technical evaluation criteria that is evaluated on a pass/fail basis. Protest at 10. However, Congress charged the Secretary of Defense with the responsibility to issue regulations in the Department of Defense FAR Supplement (DFARS) to implement section 813(b). Pub. L. No. 114-328, § 813(b). The agency issued a final rule on September 26, with an effective date of October 1. Restrictions on Use of Lowest Price Technically Acceptable Source Selection Process, 84 Fed. Reg. 50785 (Sept. 26, (continued...))

Although Inerso's interpretation of the statute may be considered reasonable, we find the agency's interpretation of section 813(c) is also reasonable. As set forth below, neither section (a) nor section (b) of the statute suggests that Congress specifically intended to preclude the use of past performance as a technical tradeoff factor with price. The statute does not specifically define either the term LPTA process or the term LPTA criteria, and the parties have not provided any controlling definition of the terms. As the agency notes, like the title of section 813 of the NDAA, FAR section 15.101-2 is titled "[LPTA] Source Selection Process." That FAR section discusses the factors that are used in the LPTA process, and specifies that award is made on a lowest price basis without any tradeoffs. Under the FAR's LPTA process, past performance may be considered but it may not be used as part of a comparative assessment. FAR § 15.101-2(b)(1).

Inerso also relies on legislative history to support its view that Congress intended to restrict the use of LPTA criteria--that is, where technical factors are evaluated on an acceptable/unacceptable basis. Supp. Response, Sept. 10, 2019, at 2-5. Inerso first notes that the predecessor to the instant provision (in section 884 of the NDAA for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 948, codified at 10 U.S.C. § 2302 note), provided that in procuring personal protective equipment the Secretaries of the Army, Navy, and Air Force should, to the maximum extent practicable, use "source selection criteria" that are predominantly based on technical qualifications for the item, and not price. Id. at 3. Inerso notes that the House proposed a modification to this section of the NDAA for FY 2017, which defined "source selection criteria" as criteria that are predominately based on technical qualifications of the item rather than price. Id. at 4 (quoting NDAA for Fiscal Year 2017, H.R. 4909, 114th Cong. § 804 (as placed on Senate Calendar, May 25, 2016)). Inerso acknowledges that the provision defining source selection criteria was not included in the NDAA for FY 2017. Inerso reasons, however, that since personal protective equipment is included in section 813(c), as one of the purchases for which LPTA award criteria should be avoided, the definition of criteria used in the proposed amendment is instructive as to the meaning of source selection criteria. Id. at 4.

Inerso notes that another predecessor provision in the NDAA for FY 2016 instructed the Secretary of Defense to establish the values and metrics for evaluating companies offering audit services, including, among other things, experience, personnel qualifications and certifications, and past performance, "before using the [LPTA] evaluation method for the procurement of audit or audit readiness services." Supp. Response, Sept. 10, 2019, at 4 (quoting NDAA for FY 2016, Pub. L. No. 114-92, § 804). However, in the NDAA for FY 2017, Congress included audit services in section 813(b),

(...continued)

2019). The final DFARS rule includes a limitation under DFARS section 215.101-2, Lowest price technically acceptable source selection process, which limits the use of the LPTA procedures set forth in FAR section 15.101-2, in procurements predominately for IT services. Id. at 50788-89.

under those procurements that should not use LPTA criteria to the maximum extent practicable. Inersso reads the change from discussing an LPTA evaluation method for audit services, to including audit services under the provision that restricts the use of LPTA criteria, as a specific intent by Congress to use the word criteria. Again, in Inersso's view this means that agencies should avoid evaluating technical factors on a pass/fail basis.

With respect to the legislative history of the restriction, while Congress proposed an amendment which defined criteria for personal protective gear as predominately based on technical qualifications, Inersso notes that definition was not included in the NDAA for Fiscal Year 2017. Thus, Congress chose not to define criteria in section 813 of the NDAA for Fiscal Year 2017. Similarly, the change from process to criteria for audit services does demonstrate that Congress viewed criteria as separate from process. Again, Congress did not define criteria for purposes of audit services. As a result, none of Inersso's legislative history arguments lead us to conclude that the agency's interpretation of section 813(c) is unreasonable.

As the protester cannot point to anything in section 813 or in regulation that specifically precludes the RFQ's selection criteria, which uses a price/past performance tradeoff as the basis of source selection, we conclude the RFQ's evaluation scheme does not violate procurement law.³

The protest is denied.

Thomas H. Armstrong
General Counsel

³ In a supplemental protest filed with its comments, Inersso asserts that the contracting officer abused her discretion in planning the solicitation (evaluating the technical factor on a pass/fail basis, and selecting an awardee using a past performance/price tradeoff) because the justification for the use of this evaluation scheme articulated in the statement of facts provided with the agency report is absent from the contemporaneous procurement record. Supp. Comments, Sept. 27, 2019, at 1, 2. Inersso has not provided sufficient information to establish the likelihood that the agency violated applicable procurement laws or regulations. See id. at 2 n.2 ("Inersso is not alleging that the [contracting officer] violated a statutory or regulation requirement to document her rationale for choosing [the evaluation scheme]. . . Inersso is not aware of any such obligation" under FAR part 16.). This basis of protest therefore is dismissed without further action. See Bid Protest Regulations, 4 C.F.R. § 21.5(f). Moreover, in our view, this basis of protest is an attempt to challenge the agency's decision to evaluate the technical factor on an acceptable/unacceptable basis, independent of section 813 of the NDAA. Since it was not filed before July 29, 2019, the closing time for the receipt of quotations, it is untimely. 4 C.F.R. § 21.2(a)(1).