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Decision

Matter of: Eminent IT, LLC

File: B-418570; B-418570.2; B-418570.3

Date: June 23, 2020

William A. Shook, Esq., The Law Offices of William A. Shook PLLC, for the protester. Kathleen D. Martin, Esq., Department of State, and Mark R. Hagedorn, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies. Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging agency improperly removed requirement from Small Business Administration's 8(a) program is sustained where solicitation did not create a "new" requirement.
 2. Protest alleging solicitation failed to provide sufficient information is dismissed where protest was filed more than 10 days after protester should have known the basis for its protest.
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DECISION

Eminent IT, LLC, an 8(a) small business concern of Arlington, Virginia, protests the decision of the Department of State (DOS) to issue request for quotations (RFQ) No. 19AQMM20Q0047, for the maintenance, operation, and management of PeopleSoft v9.x or later in a production environment using Scaled Agile Framework (SAFe), for competition among small businesses.¹ The protester contends that the agency has improperly removed the requirement from the Small Business Administration's (SBA) 8(a) program. The protester also contends that the terms of the solicitation fail to provide sufficient information for intelligent competition.

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance of those contracts through subcontracts with socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the 8(a) program.

We sustain the protest in part, and dismiss it in part.

BACKGROUND

On February 21, 2020, the DOS issued the solicitation, which was competed among small businesses under General Services Administration (GSA) Schedule 70, Information Technology Professional Services. Agency Memorandum of Law (MOL) at 5. The RFQ contemplated the establishment of a blanket purchase agreement (BPA) using the procedures of Federal Acquisition Regulation (FAR) part 8. Contracting Officer's Statement (COS) at 1-3; Agency Report (AR), Tab 1, RFQ-0047 at 2. The agency sought a vendor to maintain, operate, and manage PeopleSoft v9.x or later in a production environment, including any follow-on functional requirements and application support using SAFe methodology, for the Department's Bureau of Human Resources, Executive Office (HR/EX). COS at 1. The solicitation anticipated that source selection would be made on a best-value basis where technical factors, when combined, were considered significantly more important than price. *Id.* The due date for quotations was March 31. *Id.* at 3.

According to the contracting officer, the SAFe requirement is for the agency's Global Employment Management System (GEMS), and is intended to serve as the "flagship project" for implementing SAFe across the agency's Integrated Personnel Management System (IPMS) for HR/EX.² *Id.* at 1. The agency explains that the "primary goal of SAFe" is to help create and expand a "Lean Enterprise," which will allow the agency to deliver value in the shortest, sustainable time period. Response to SBA Comments at 4. The agency seeks a contractor capable of teaching "SAFe's Lean-Agile mindset" in a PeopleSoft Federal Human Capital Management (HCM) environment to facilitate this expansion. *Id.* at 1, 4.

As relevant here, the agency awarded a task order on September 20, 2015, for Peoplesoft-related services to an 8(a) small business named Buchanan & Edwards (B&E) under the GSA's 8(a) STARS II Governmentwide Acquisition Contract (GWAC).³ AR, Tab 4, RFQ-3965 at 16; MOL at 3-4. Similar to the current solicitation, the B&E task order required the awardee to provide, maintain, operate, and manage PeopleSoft v9.1 for the Bureau of HR/EX at DOS to support the development of GEMS. MOL at 3-4. The period of performance for the task order was one year with four option years. *Id.* at 4.

² IPMS, as described by the contracting officer, is a modernized systems environment that allows the DOS, and other federal agencies, to carry out their missions through effective utilization of their human resources, information assets, infrastructure, and operations. AR, Tab 2, Market Research Report (MRR) at 2. GEMS is one of five major integrated business components that make up the IPMS network. *Id.* at 3-4.

³ Throughout this decision, we refer to this task order as the "B&E task order."

According to the contracting officer, the agency decided against obtaining the SAFE requirement through a follow-on task order to the B&E task order because the agency viewed SAFE as a new requirement. COS at 1-2. The agency then issued a request for information (RFI) to determine the most appropriate procurement vehicle for obtaining the required services. AR, Tab 2, Market Research Report at 4-6.

The agency publicly posted the RFI on September 5, 2019, with responses due on September 19. *Id.* at 1. The RFI listed as “key components” a facilities clearance, PeopleSoft Federal Human Capital Management (HCM) experience, and corporate experience using SAFE methodology for PeopleSoft Federal HCM development. *Id.* at 4. The agency received twelve responses, including three from 8(a) vendors, by the September 19 due date.⁴ *Id.* In reviewing the responses, the agency determined that only one vendor met all the three key components, and that the most capable vendors had GSA Schedule 70 contracts. *Id.* On February 21, 2020, the Department issued the solicitation for competition among small businesses under GSA Schedule 70. MOL at 5.

Eminent filed this protest with our Office on March 15, prior to the due date for quotations. Protest at 1.

DISCUSSION

Eminent argues that the agency violated FAR 19.815 and SBA regulations at 13 C.F.R. § 124.504(d) when it issued the current solicitation for the SAFE requirement. Specifically, Eminent alleges that the agency failed to obtain the SBA’s permission prior to removing the requirement from the 8(a) program. Eminent further contends that the SAFE solicitation failed to include a reasonable description of the work to be performed, or a deliverable schedule for anticipated work.

Alleged Violation of FAR 19.815 and 13 C.F.R. § 124.504(d)

Both FAR 19.815 and 13 C.F.R. § 124.504(d) state that when a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) program unless the SBA agrees to release it for non-8(a) competition. The requirement to remain in the program does not apply, however, if the follow-on work qualifies as a “new requirement.” *eAlliant, LLC*, B-407332.4, B-407332.7, Dec. 23, 2014, 2015 CPD ¶ 58 at 8-9. The term “new requirement” includes: “[t]he expansion or modification of an existing requirement . . . where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.” 13 C.F.R. § 124.504(c)(1)(ii)(C).

⁴ The protester did not respond to the RFI. See AR, Tab 2, Market Research at 4.

Here, Eminent contends that the SAFe requirement is “clearly [a] follow-on” to the B&E task order, and thus, is not a new requirement. Protest at 5. Specifically, Eminent alleges that the work does not require additional or different types of capabilities or work because “[t]he work required to be performed under the current task order and the new solicitation is the same.” Comments and Supp. Protest at 5. In support of this argument, Eminent submitted a word comparison between the statement of work (SOW) for the SAFe solicitation and the SOW for the B&E task order. *Id.*, attach. 5, Word Comparison at 1. According to Eminent, the only difference between the SOWs is that the current solicitation requires a “Performance Management Plan” (PMP). Comments and Supp. Protest at 6. The PMP, Eminent argues, describes only how to measure the work, but does not propose different “requirements.” *Id.*

Finally, Eminent argues that any expansion or modification that occurred did not result in a price adjustment of at least 25 percent, and even if such an expansion occurred, our Office should not find such an adjustment dispositive of the “new requirement” issue. *Id.* at 6; Protester’s Response to SBA’s Comments at 6.

The agency, however, asserts that SAFe methodology qualifies as a new requirement because (1) the current work under the B&E task order does not encompass the entirety of GEMS, (2) the SAFe requirement includes additional services and processes, and (3) the B&E task order requires the use of “standard waterfall systems development life cycle.” Agency Response to SBA’s Comments at 2-3. Specifically, the agency alleges that the SAFe requirement will provide HR/EX with a vendor with “proven experience” implementing PeopleSoft Federal HCM using the SAFe Agile methodology. *Id.* The existing B&E Task Order and other contracts, according to the agency, do not encompass these services or this level of expertise. *Id.*

In developing the record, we asked the SBA to comment on whether the inclusion of SAFe methodology qualifies as a new requirement. SBA expresses the view that this methodology does not impose a new requirement, stating that the primary and vital requirements of the two solicitations are “nearly identical.” SBA Comments at 8-9. To the extent that any price adjustment occurred, SBA argues we should not view the difference between the two costs as dispositive. *Id.* In this connection, the SBA points out in its comments that “[t]o the extent that any price adjustment stems from the addition of services that are ancillary to the primary and vital requirements under the contract [. . .], or general inflation of labor rates, SBA believes such costs should not be considered with respect to [] whether there is a significant change in magnitude.” SBA Comments at 9.

We agree with the SBA that based on the record here, DOS has not demonstrated that the SAFe requirement qualifies as a “new requirement.” First, the requirements listed in the B&E task order and the current solicitation are virtually identical as both require the contractor to “[m]aintain, operate, and manage PeopleSoft v9.x or later [], including any follow-on functional requirements and application support” to support GEMS. *Compare* AR, Tab 1, RFQ-0047 at 1 *with* AR, Tab 4, RFQ-3965 at 16.

Second, although the agency contends that the current requirement calls for the use of scaled agile framework methodology, whereas the B&E task order requires the use of a “standard waterfall systems development life cycle,” Agency’s Response to SBA’s Comments at 3, the agency fails to show that the B&E task order actually requires the use of “standard waterfall systems development life cycle.” Nowhere in the B&E task order does the word “waterfall” appear. See AR, Tab 4, RFQ-3965. Moreover, in response to the agency’s assertion that the current requirement differs from the B&E requirement in terms of the required methodology, the protester furnished an affidavit from the vice president of B&E who represents that B&E is currently using the SAFe methodology under the B&E task order. Protester’s Opposition to Request for Dismissal, attach. 4, Affidavit at 1. Based on the record before us, we find the agency’s assertion that the current task order requires a different methodology to be unsupported.

Although the agency did not expressly argue that the SAFe requirement was a new requirement due to the magnitude of the price adjustment, it pointed out in its response to the SBA comments that the estimated value of the SAFe requirement is approximately double the value of the B&E task order.⁵ Agency Response to SBA Comments at 4. As noted above, SBA regulations state that a new requirement arises when a change results in a price adjustment of at least 25 percent. 13 C.F.R. § 124.504(c)(1)(ii)(C). The change in the requirement must have caused the price adjustment, however, and comparing the value of the two procurements, without more, is insufficient to explain the cause of the price adjustment. As previously noted, SBA expresses the view that to the extent any price adjustment here “stems from the addition of services that are ancillary to the primary and vital requirements under the contract [. . .], or general inflation of labor rates,” it “believes such costs should not be considered with respect to [] whether there is a significant change in magnitude.” SBA Comments at 8. Our Office accords great weight to the SBA’s interpretation of its own regulations, unless the interpretation is unreasonable. See *B&D Consulting, Inc.*, B-413310 et al., Sept. 30, 2016, 2016 CPD ¶ 280 at 5 n.5. The SBA also advises that “applying the 25 percent rule rigidly in all cases could allow procuring agencies to circumvent the intent of the 8(a) release rules.”⁶ SBA Comments at 7-8.

The agency does not contend, nor does the record establish, that the price adjustment here was attributable to the introduction of SAFe methodology. As a result, we cannot

⁵ Specifically, the agency stated that “[t]he value of the SAFe Solicitation is \$36 million including four (4) options[,]” and “[t]he BE task order has a ceiling of \$17,946,158 for base [including] (4) four options.” Agency Response to SBA Comments at 4.

⁶ The SBA points out, for example, that strict application of the 25 percent rule could permit an agency to remove two requirements from the 8(a) program without SBA’s agreement if combining the two requirements would result in a requirement more than 25 percent greater in value than either of the previous requirements; according to SBA, this would be inappropriate. SBA Comments at 8 n.4.

conclude that the change in the price of the requirement leads to a conclusion that the requirement is new. Accordingly we sustain this ground of protest.

Challenge to Solicitation

In its supplemental protest, Eminent argues that the solicitation failed to provide sufficient information to allow vendors to compete intelligently. For the reasons discussed below, we dismiss the contention.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. To be considered timely, a protest must be filed within 10 calendar days of when the protester knew, or should have known, its basis for protest. 4 C.F.R. § 21.2(a)(3).

Here, Eminent contends that the solicitation failed to provide a reasonable description of the work and a deliverable schedule, which consequently inhibited the ability of vendors to compete intelligently. Comments and Supp. Protest at 12. In establishing the timeliness of its supplemental protest, Eminent argues that it was unaware of these alleged improprieties until they were “first revealed” when the agency provided a cost estimate for the work as an exhibit to the agency report. Resp. to Motion to Dismiss at 2. This cost estimate, according to Eminent, indicates that the agency intends to use the current solicitation to procure an effort “far beyond” the work that the agency has identified in its solicitation. Comments and Supp. Protest at 12.

Eminent’s challenge to the terms of the solicitation is untimely. On April 7, the agency filed a request for dismissal that included a statement of facts by the contracting officer. Req. for Dismissal, exh. 2. The contracting officer’s statement of facts expressly stated that “[t]he independent Government cost estimate was: \$36M, including options.” *Id.* at 3. Even if we accept Eminent’s contention that the cost estimate informed it of this basis of protest, then its protest was due no later than 10 days after it first received the cost estimate on April 7. *Id.* at 1. Instead, Eminent filed its supplemental protest 17 days later. Therefore, Eminent’s supplemental protest is untimely.

RECOMMENDATION

We recommend the agency reconsider whether the current requirement for Peoplesoft support using scaled agile framework methodology qualifies as a new requirement. In the event the agency continues to conclude that the requirement is new, we recommend that the agency document that conclusion and the basis for its disagreement with SBA. In the event the agency agrees with the SBA’s conclusion, we recommend that the agency either procure the requirement using the SBA’s 8(a) program, or obtain the SBA’s agreement before removing the requirement from the program. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest,

including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Eminent's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained in part, and dismissed in part.

Thomas H. Armstrong
General Counsel