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Decision

Matter of: Selex ES, Inc.

File: B-420799

Date: September 6, 2022

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DIGEST

Protest challenging the terms of a solicitation is sustained where the solicitation contains an ambiguity regarding when certain requirements must be met in order for proposals to be found technically acceptable.

DECISION

Selex ES, Inc., of Overland Park, Kansas, challenges the terms of a solicitation under request for proposals (RFP) No. FA8102-22-R-0003, issued by the Department of the Air Force for development of a portable tactical air navigation system. The protester argues that the terms of the solicitation are unduly restrictive of competition because they can be reasonably interpreted as requiring offerors to meet the navigation system's flight check qualification and readiness level requirements at the time of proposal submission, rather than after award during performance of the contract.

We sustain the protest.

BACKGROUND

The RFP, issued on May 3, 2022, pursuant to the procedures of the Federal Acquisition Regulation (FAR) part 15, seeks proposals for the replacement of a man-portable tactical air navigation system (MP TACAN). Agency Report (AR), Tab 52, RFP at 1,

1605;¹ AR, Tab 1, Contracting Officer's Statement (COS) at 20. A TACAN is a navigation system used by military and civilian aircraft for landing at or flying between airports and landing fields. An MP TACAN is a small, lightweight rugged version of a TACAN that can easily be carried by two people. See AR, Tab 10, Government Industry Day Presentation Slides. The Air Force anticipates award of a single fixed-price indefinite-delivery, indefinite-quantity contract, where the agency will place orders for a 5-year base period and one 2-year option period. RFP at 682-721, 795, 1577, 1605; COS at 21.

The solicitation contemplates award will be made on a best-value tradeoff basis, considering the following evaluation factors: technical, technical risk, and price. RFP at 1605-1606. Under the technical factor, proposals will be evaluated as either acceptable or unacceptable. *Id.* at 1605. For proposals found to be technically acceptable, the RFP explains that tradeoffs will only be made between technical risk and price, with technical risk and price being "approximately equal" in importance. *Id.* at 1607. With respect to the technical factor, the RFP provides that the evaluation will be based on each offeror's approach for meeting the requirements listed in six subfactors: systems requirements document (SRD) cross-reference; SRD requirements; SRD non-compliance; small business participation; delivery requirements; and contract data requirements list data rights. *Id.* at 1607-1608. Relevant here, the RFP requires offerors to, among other things, perform a successful flight check² and meet Technology Readiness Level 8 (TRL8)³ and Manufacturing Readiness Level 9 (MRL9)⁴ requirements. RFP at 188, 232, 235, 1607-1608.

After the issuance of the solicitation, Selex contacted the agency to express its concerns regarding what the firm viewed as conflicting language in the RFP. Selex

¹ Unless otherwise noted, references to page numbers are to sequential numbering stamped on the pages of the Adobe PDF documents provided by the agency.

² A flight check includes an airborne inspection of flight procedures and the validation of electronic signals that are transmitted from fixed to mobile navigation systems. Supp. Memorandum of Law (MOL) at 15. The purpose of a flight check is to evaluate the effectiveness of the navigational aid, ensure that transmission signals are compatible with other Air Force aircraft avionics, and test that the technology meets performance criteria. *Id.*

³ TRL8 is the readiness level that indicates the required technology has been proven to work in its final form, under the expected conditions. AR, Tab 19, Status Briefing at 11. This means that the technology is developed to the point where it is an actual system that has been completed and flight qualified through testing and documentation. COS at 39.

⁴ MRL9 is the readiness level that indicates the technology has either been previously produced, is currently in production, or has achieved "low rate initial production." Status Briefing at 12. This readiness level indicates that the technology is ready and capable of "full rate production." COS at 39-40.

asserted that the solicitation was unclear whether the flight check requirement is due at the time of proposal submission or after award, and the protester requested the RFP be revised to provide clarity. AR, Tab 47, Selex Req. to Revise RFP. The Air Force responded that it would not amend the solicitation because, in the agency's view, the RFP language is clear. AR, Tab 48, Agency Resp. to Selex Req. at 5. Shortly thereafter, on June 3, prior to the due date for proposal submissions, Selex filed this protest with our Office.

DISCUSSION

Selex argues that the solicitation is unduly restrictive of competition because the solicitation's plain language can be read as requiring offerors to submit successful flight check and TRL8/MRL9 readiness level attestations at the time of proposal submission, rather than after award. See Protest at 6 ("Selex protests that the agency's demand for a successful flight check and TRL8/MRL9 attestation *at the time of proposal submission* is unduly restrictive of competition. . . .") (emphasis added). According to the protester, performing a successful flight check and obtaining certain readiness levels do not become relevant until after award, therefore the requirements are not necessary to meet the agency's need at the time of proposal submission. *Id.* at 7. In responding to the protest, the agency takes the position that the solicitation does not require offerors to meet the flight check requirements at the time of proposal submission, but rather, they are due after award. MOL at 15-16. The Air Force contends that the requirements--due after award--are reasonably necessary to meet the agency's needs. *Id.* at 11.

Fundamental to the protest is the parties' differing understanding of whether the solicitation requirements at issue are due at the time of proposal submission or after award. Both the agency and protester cite to various provisions within the RFP to advance their interpretations of when the RFP establishes the requirements as due. Notwithstanding their differing interpretations of the solicitation, both parties, however, are in agreement about the agency's actual needs. That is, both parties agree that the agency does not in fact need offerors to meet the flight check requirements until after award.

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. *Harper Constr. Co., Inc.*, B-415042, B-415042.2, Nov. 7, 2017, 2017 CPD ¶ 47 at 4. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. *Desbuild Inc.*, B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. If the solicitation language is unambiguous, our inquiry ceases. *Id.* An ambiguity, however, exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Office Design Grp.*, B-415411, Jan. 3, 2018, 2018 CPD ¶ 43 at 5. 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.*, B-412380, Jan. 28, 2016, 2016 CPD ¶ 51 at 6.

On this record, we find that the RFP contains obvious conflicting information that creates an ambiguity as to whether the flight check and readiness level requirements are due at the time of proposal submission or after award. Based on the discrepancies found in the solicitation, we conclude that both the Air Force and the protester have produced reasonable interpretations of due dates for the requirements at issue.

For example, in support of its position that the readiness level and flight check requirements are due at time of delivery (after award), the Air Force refers to provisions found in the RFP's statement of work (SOW). Under the Technical Requirements section of the SOW, the solicitation indicates that "[t]he systems shall meet, meet to the fullest extent possible, or exceed all requirements of the MP TACAN SRD . . . by the required delivery date for the first unit and meet all requirements of this SOW."⁵ RFP at 188 (emphasis added). Further, regarding the flight check requirement specifically, section 6.4.2 of the RFP's Delivery Requirements provides:

Proof of successful Contractor flight check should be provided upon delivery of the first unit. . . . The Contractor shall provide documentation of a flight check if it has been accomplished prior to acceptance; if not, a successful government flight check may be used as sufficient documentation for this requirement.

Id. at 189-190. Accordingly, the agency argues that, although an offeror can submit a flight check with its proposal submission, such check is not required at that time, as the agency can perform its own flight check after award, which will comply with the standards required by the solicitation. See COS at 22.

Additionally, the agency claims its interpretation of the post-award due date for the flight check and readiness level requirements is supported by the solicitation's evaluation scheme for the technical factor and its subfactors, found in section M.2.2 of the RFP. As discussed above, the RFP identifies six subfactors to be evaluated under the technical factor. RFP at 1607-1608. In order to be found acceptable under the technical factor, proposals are required to receive a rating of acceptable for each subfactor. *Id.* A single deficiency within a subfactor can result in a rating of unacceptable for that subfactor. *Id.*

The first subfactor (SRD Cross-Reference) requires an offeror to complete the agency's requirements verification matrix (RVM), found in Table 1 of Appendix A of the RFP.⁶ *Id.* at 1584; see *id.* at 665 (RVM). Instructions on how to complete the matrix provide:

⁵ Flight check and TRL8/MRL9 requirements are listed in the SRD. RFP at 232, 235.

⁶ Throughout the RFP, the matrix is referred to as both the SRD Cross Reference Matrix, found at Appendix 1, and the Requirements Verification Matrix, found at Appendix A. Compare RFP at 1607, with RFP at 664-671. Although both descriptions

The Offeror shall provide a completed SRD Cross-Reference Matrix (Appendix 1) indicating compliance/non-compliance with the SRD minimum threshold requirements outlined in Section 2 of the SRD for the MP TACAN replacement. An indication of compliance indicates the proposed product specifications for the MP TACAN replacement currently (as of the date of the proposal) meets the threshold requirement as is, without additional testing or modification. Non-compliance indicates the current proposed product specifications for the MP TACAN replacement requires additional testing or modification to meet the minimum threshold (identifying a Performance Gap). All requirements identified as non-compliant must be identified in red text in Appendix 1.

Id. at 1584. To receive a rating of acceptable under this subfactor, an offeror must complete the matrix, clearly indicating “compliance [or] non-compliance” for each requirement listed in the matrix. *Id.* at 1607. For all requirements with which the offeror “complies,” under subfactor two (SRD Requirements), the offeror is tasked with providing documentation and explanation of how the offeror’s stated approach will meet that requirement. *Id.* at 1607-1608. For all requirements with which the offeror indicates “non-compliance” in the RVM, the offeror is instructed to “defer[] . . . discussion” to subfactor three. *Id.* at 1608. Subfactor three (SRD Non-Compliance) explains that the agency will “assess the offeror’s proposed approach for overcoming/meeting each performance gap identified in Subfactor 1 to fully meet the threshold requirements listed in the SRD to the fullest extent possible.” *Id.* Subfactor three is met when the offeror’s proposal provides documentation and explanation of how the firm’s approach will meet the requirements, which indicates to the agency that the offeror has an adequate understanding of the requirements, even if those requirements are not yet satisfied. *Id.*

The Air Force argues that while an offeror may not be “in compliance” with all RFP requirements at the time of proposal submission, the solicitation provides an alternative evaluation scheme for those who cannot yet, but will ultimately be able to, satisfy the flight check and readiness requirements. Supp. MOL at 3. According to the Air Force, an offeror will still be meeting all--and will not be taking exception to any-- requirements by following the instructions for submitting its technical proposal. Supp. MOL at 1-2. In the agency’s view, a requirement listed as a non-compliance in an offeror’s proposal will not make an offeror ineligible for award so long as the offeror notes the non-compliance on the requirements verification matrix (as instructed by subfactor 1) and provides an adequate explanation and approach for how the offeror will meet that requirement prior to performance (as directed by subfactor 3). *Id.* at 3.

Here, the SOW and section M of the RFP support the agency’s position that the terms at issue are not required prior to award. As such, we cannot find the agency’s

refer to the same document, Appendix A is what is included in the RFP provided in the agency report. Thus, we refer to the document as the requirements verification matrix.

interpretation inherently unreasonable. See *RELI Grp., Inc., supra* (“A party’s particular interpretation need not be the most reasonable to support a finding of ambiguity.”).

On the other hand, Selex’s interpretation that the requirements at issue are due at the time of proposal submission is also supported by provisions in the RFP, specifically in the SRD and section M.1.6. The protester points to the SRD’s design and construction constraints (DES) no. 12, as an example.⁷ Protest at 4-5. Specifically, the DES-12, Non-Developmental System, provision reads as follows:

At the time of solicitation, the system as a whole shall meet the following:

- a. Non-developmental equipment that has passed an [Federal Aviation Administration] FAA 8200.1, Chapter 24 combat flight inspection or a full commissioning flight inspection.
- b. Minimum Technology Readiness Level (TRL) of 8 per the [Department of Defense] DoD TRL Deskbook.
- c. Minimum Manufacturing Readiness Level (MRL) of 9 per the DoD MRL Deskbook.

RFP at 235 (emphasis added). Further, Selex points to the requirements verification matrix to support its interpretation. There, under the “timing” column, the matrix lists the flight check as being due at the time of proposal submission.⁸ *Id.* at 669. Similarly, the

⁷ In response to Selex’s reference to DES-12 as support for its interpretation, the Air Force argues that the SRD flight check and readiness level requirements (DES-12) are only to be applied to offerors whose MP TACANs are in a “non-developmental” stage. According to the agency, because [DELETED], this requirement (DES-12) in the SRD does not apply [DELETED]. Supp. MOL at 7. Our review of the solicitation reveals, other than the fact that the requirement description for DES-12 is labeled “non-developmental system,” there is no express indication that this requirement is limited as the agency understands it to be and will not apply to all offerors, or that there will be a separate requirement, due date, or evaluation scheme for offerors whose proposed systems are still in development. Thus, we do not find it unreasonable that the protester interprets this provision as requiring all offerors (including Selex) to propose non-developmental systems and meet the flight check and TRL8/MRL9 requirements of DES-12.

⁸ Again, the Air Force argues that although the matrix identifies the flight check requirement as being due at the time of proposal submission, the matrix also includes general language stating that a “contractor may offer alternative verification methods with associated justification.” Supp. MOL at 7; RFP at 666. We agree with the protester, however, that the explanation in the RFP about how to take exception to a requirement does not negate the fact that the flight check is, in fact, required, and a

requirements verification matrix notes that “[w]hile the [t]iming for many of the requirements shows that the verification will be during the execution of the contract (EoC), the contractor is still responsible for meeting each of the requirements *at the time of the proposal.*” *Id.* at 666 (emphasis added). We cannot find unreasonable, given the information the protester identifies in the SRD and RVM, an offeror’s view that the solicitation requires offerors to meet the flight check and readiness level requirements at the time of proposal submission.

Moreover, Selex emphasizes the impact of section M.1.6 of the RFP. According to the protester, the RFP’s evaluation scheme, found in section M, advises offerors that flight check and readiness level requirements be complete at time of proposal submission because the failure to comply with those terms at proposal submission could result in elimination from award. Comments at 5-6.

Section M.1.6 (Terms and Conditions) of the RFP requires offerors to “meet all solicitation requirements, such as terms and conditions, representations and certifications, Statement of Work (SOW), and System Requirements Document (SRD) requirements, *in addition to* those identified as factors and subfactors.” *Id.* at 1606 (emphasis added). Furthermore, the solicitation warns offerors of the following:

Failure to comply with the terms and conditions of the solicitation may result in the offeror being ineligible for award. Offerors must clearly identify any exception to the solicitation terms and conditions and must provide complete supporting rationale. The Government reserves the right to determine any such exceptions unacceptable, and the proposal, therefore, ineligible for award.

Id. Selex contends that this provision, when read in conjunction with the other solicitation terms, indicates that the flight check and readiness level requirements are due at time of proposal submission. First, the protester notes that based on a reasonable reading of section M, all requirements listed in the solicitation must be complied with at the time of submission because the agency could find that any indication of an exception or non-compliance--even with supporting rationale--justifies elimination from consideration for award. Supp. Comments at 1. Selex claims that the scheme set forth for evaluating non-compliances in an offeror’s technical proposal does not negate the ineligibility language of section M.1.6. The protester contends that section M.1.6 expressly states that failure to meet the requirements of the SOW and SRD, in addition to criteria identified in subfactors and factors in section M.2.2, could render a proposal ineligible for award. *Id.* at 3; RFP at 1606.

Our review of the record confirms that there is no language in section M.1.6 indicating that a proposal will not be deemed ineligible for award--or that section M.1.6 does not apply--if the proposal lists and provides explanation of its non-compliances in

reasonable offeror could assume from the matrix that the flight check is due at time of proposal submission. See Supp. Comments at 3.

accordance with section M.2.2 (which describes how proposals will be evaluated under the technical factor and its subfactors). See RFP at 1606-1608. As such, it is not unreasonable for an offeror to assume that its non-compliance with terms that were listed in the SRD as being due at the time of proposal submission, could be interpreted as exceptions to solicitation requirements, which could lead to elimination from the competition.

Therefore, given the conflicting provisions in the solicitation, it is impossible for offerors such as the protester to know whether the flight check and TRL8/MRL9 requirements are due at time of proposal submission or after award. Because, as discussed below, we find the protester was competitively prejudiced by this patent ambiguity within the solicitation, we sustain the protest. Moreover, until the solicitation is amended to unambiguously reflect when the requirements at issue are due, we need not address the protester's allegation that the solicitation terms are unduly restrictive of competition, because that claim is premised on the protester's assumption that the solicitation expects the requirements at issue to be due at the time of proposal submission--an interpretation that is called into question by the ambiguous solicitation terms discussed above.

Competitive Prejudice

Competitive prejudice is an essential element of every viable protest. *Harper Constr. Co., Inc., supra* at 6. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *CWTSatoTravel*, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 11-12. In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. *Pond Sec. Grp. Italia JV--Costs*, B-400149.2, Mar. 19, 2009, 2009 CPD ¶ 61 at 4. Here, the Air Force was required to provide offerors with sufficient detail in the solicitation to enable them to compete intelligently and on a relatively equal basis. See *CWTSatoTravel, supra* at 12. At the time this protest was filed, the solicitation's failure to clearly state when the agency required the flight check and TRL8/MRL9 terms to be completed prejudiced Selex's ability to prepare a proposal that could respond to the agency's actual needs. *Pond Sec. Grp. Italia JV--Costs, supra* at 4.

RECOMMENDATION

We recommend that the Air Force revise the solicitation to unambiguously reflect the due date for the flight check and TRL8/MRL9 requirements. If requirements are due at different times, based upon whether the offeror's MP TACAN is in a developmental or non-developmental stage, the RFP should clearly delineate those differences. If the agency ultimately finds that the flight check and readiness level requirements are not due until after award, the Air Force should revise the solicitation's evaluation scheme so that the agency is not evaluating compliance with those terms at the time of proposal

submission. After the solicitation has been revised, the Air Force should afford all offerors an opportunity to submit proposals based on the clarified requirements. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' 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).

The protest is sustained.

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