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Decision

Matter of: Cybergenic Systems, LLC

File: B-421213

Date: January 19, 2023

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Linda Santiago, Esq., and Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.
Samantha S. Lee, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of the protester's proposal as technically unacceptable is denied where the agency reasonably concluded that the protester's proposal took various exceptions to material terms and conditions of the solicitation.

DECISION

Cybergenic Systems, LLC, a service-disabled veteran-owned small business (SDVOSB) of Sykesville, Maryland, protests the award of a contract to Premier Enterprise Solutions, LLC, a SDVOSB of Upper Marlboro, Maryland, under request for proposals (RFP) No. 220509, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) for enterprise cybersecurity awareness and training program support. Cybergenic challenges the agency's determination that its proposal was unacceptable.

We deny the protest.

BACKGROUND

On June 10, 2022, CMS issued the solicitation as a set-aside for SDVOSBs, seeking enterprise-wide cybersecurity and privacy awareness and training program support for CMS's Information Security and Privacy Group, which is charged with protecting CMS data. Agency Report (AR), Tab 3C, RFP at 1; AR, Tab 3D, Statement of Work (SOW)

at 5-8.¹ To meet these requirements, the agency identified two task areas to be performed in the SOW: (1) program management; and (2) training and awareness development support. AR, Tab 3D, SOW at 9-10. Task area two, training and awareness support, was further divided into three subtask areas (training modernization, learning management system support, and CyberVets training) and four optional task areas.² *Id.* According to the protester, the firm (through a wholly-owned subsidiary) has performed as a subcontractor on the incumbent contract for CyberVets training. AR, Tab 5B, Technical Proposal at 10.

The solicitation anticipated the award of a fixed-price contract with a base year and four 1-year option periods. RFP at 1, 6. The RFP provided for award on a best-value tradeoff basis, considering the following evaluation factors: corporate experience; management approach; past performance; section 508 compliance/voluntary product accessibility template (VPAT)³; and price. *Id.* at 60-61.

Relevant here, the solicitation directed offerors to submit any proposal assumptions, conditions, or exceptions. *Id.* at 58. In this regard, the RFP explained:

This information must include, but is not limited to, the terms and conditions associated with meeting the project time-frame, assumptions about the roles, responsibilities, information, facilities, or other items the offeror expects the Government will provide in support of the project, etc.

Id. The RFP also warned that “[t]he Government reserves the right to reject any proposal that includes any pricing assumption that adversely impacts the Government’s requirements or fails to comply with any of the requirements outlined herein.” *Id.*

The agency received proposals from seven offerors, including Cybergenic and Premier, by the July 15, deadline for submission of proposals. COS at 3, 9. Cybergenic identified assumptions in its proposal. AR, Tab 5B, Technical Proposal at 32, 117-26; AR, Tab 5C, Price Proposal at 8. Within the technical proposal, after stating that Cybergenic would “provide the proposed services as required in the RFP,” Cybergenic referred the agency “to Appendix 2, Reference Assumptions for specific conditions.” AR, Tab 5B, Technical Proposal at 32. Appendix 2 listed more than 30 assumptions regarding the services to be provided and “the scope, timeline, and resource plan for this engagement.” *Id.* at 117-26.

¹ Citations to the RFP are to the final amended version included at Tab 3C of the agency report. Citations to the record refer to the documents’ Adobe PDF pagination.

² The CyberVets program is a six-month rotation at CMS for military members transitioning to civilian careers to gain experience in cybersecurity. *Id.* at 14-16; Contracting Officer’s Statement (COS) at 1-2.

³ Section 508 refers to accessibility requirements established in the Rehabilitation Act of 1973. RFP at 29. To evaluate section 508 compliance, offerors were required to submit a VPAT. *Id.* at 56.

During the assessment of non-price proposals, several Cybergenic assumptions were “of concern” to the agency’s technical evaluation panel (TEP). COS at 10. The contracting officer, who also served as the source selection authority (SSA) for this procurement, then reviewed the TEP’s findings, and concluded that Cybergenic’s proposal was unacceptable because several of the assumptions in the technical proposal “either placed conditions on Cybergenic’s firm fixed pricing or took exceptions to some of the requirements of the RFP.” COS at 9; AR, Tab 10, Source Selection Determination (SSD) at 15-18. The agency therefore excluded Cybergenic from further evaluation and consideration for award. *Id.* at 18.

On September 29, CMS notified Cybergenic that it had awarded the contract to Premier. AR, Tab 11, Award Notice. After receiving a debriefing on October 6, Cybergenic filed an agency-level protest of the award. AR, Tab 14A, Agency-Level Protest. On October 13, Cybergenic withdrew its agency-level protest and filed this protest with our Office. See AR, Tab 16, Withdrawal at 1.

DISCUSSION

Cybergenic argues that the agency erred in finding its proposal technically unacceptable based on its assumptions, erred in identifying two significant weaknesses in its proposal, and failed to perform a reasonable price evaluation. Protest at 4-9; Comments at 1-10. Although we do not specifically address all of Cybergenic’s arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest.

Dismissed Allegations

As an initial matter, Cybergenic argued that the RFP included ambiguous terms and otherwise did not clearly define the agency’s requirements. Protest at 2-3. Before the submission of the agency report, the agency requested dismissal of this argument as an untimely challenge to the terms of the solicitation. Req. for Dismissal (RFD) at 2-6.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. 4 C.F.R. § 21.2. 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. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the time set for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1).

Cybergenic did not dispute that its protest was filed after the time established for receipt of proposals. Instead, the protester argued that its allegation was timely raised after award because the “ambiguities” at issue “did not rise to the initial level of gross, obvious, or glaring requiring a pre-award protest.” Response to RFD at 1. At the same time, however, the protester asserted that it was aware of the “subtle ambiguities and

inconsistencies that could dramatically affect pricing and scope” during proposal preparation, and was forced to include assumptions in its proposal as a result. *Id.* at 1-2. In other words, the protester conceded that it was aware of the alleged lack of clarity in the solicitation before proposal submission. *See id.* To the extent there was an ambiguity in the solicitation--and the protester was aware of it when it submitted its proposal--that ambiguity was patent, not latent. *See Candor Sols., LLC*, B-418682.2, Sept. 15, 2020, 2020 CPD ¶ 297 at 8-9. Therefore, the protester was required to raise those concerns before the time established for receipt of proposals. *AmaTerra Env't, Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. As such, we dismissed the allegation as untimely.

Additionally, Cybergenic challenged the evaluation of the awardee’s proposal, alleging that Premier’s staffing plan was inadequate, and that the awardee did not have qualified key personnel or the ability to self-perform at least 51 percent of the work as required for this SDVOSB set-aside. Protest at 3-4. The agency argued that these contentions were unsupported speculation that the awardee’s proposal may have been inadequate. RFD at 4-5. In response, the protester acknowledged that “[o]bviously Cybergenic has not seen the Awardee’s proposal,” but argued that it advanced a sufficient basis for protest based on, essentially, Cybergenic’s “unrivaled” experience and belief that only Cybergenic could have proposed an adequate approach to the CyberVets program that constitutes part of the requirements under the solicitation. Response to RFD at 4-5.

Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Pacific Photocopy & Rsch. Servs.*, B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4. To achieve this end, our regulations require a protest to include sufficient factual bases to establish a reasonable potential that the protester’s allegations may have merit; bare allegations or speculation are insufficient to meet this requirement. 4 C.F.R. § 21.1(c)(4) and (f); *Ahtna Facility Servs., Inc.*, B-404913, B-404913.2, June 30, 2011, 2011 CPD ¶ 134 at 11. Unsupported assertions that are mere speculation on the part of the protester do not provide an adequate basis for protest. *Science Applications Int’l Corp.*, B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2.

Here, Cybergenic’s suspicion about the awardee’s approach and capability to perform was based only on Cybergenic’s belief that it is uniquely capable of the work to be performed under this solicitation, and thus amounted to nothing more than bare allegations and speculation. *See id.* Accordingly, these allegations were also dismissed.

Technical Acceptability

Turning to the remaining allegations, Cybergenic challenges the agency’s determination that the firm’s proposal was technically unacceptable. Comments at 1-4. As part of its proposal, Cybergenic identified 26 numbered assumptions, with several containing additional assumptions in bullet format. AR, Tab 5B, Technical Proposal at 117-26. The agency concluded that Cybergenic’s proposal was unacceptable because the SSA found that four of the assumptions (Nos. 11, 20, 21, and 24) took exception to material

terms of the RFP and placed conditions on the protester's proposed price. AR, Tab 10, SSD at 15. As a representative example, we discuss one assumption below.

Proposal Assumption No. 11

First, the agency found unacceptable the following assumption (No. 11) regarding project support:

In addition, CMS will designate a member of its executive team who is the project sponsor. In this role the executive team member will be available on a periodic basis to participate in discussions on overall progress and possible issues / risks.

- By the start of the project, CMS will have confirmed the participation levels of the resources that will participate in the initial process design sessions as proposed by the Cybergenic Systems team.
- If CMS is unable to meet any of the resource estimates provided by the Cybergenic Systems team, we will work with CMS to determine the alternatives and process a change order for the impact on the project.

Id.; AR, Tab 5B, Technical Proposal at 119-20. According to the SSA, this assumption/condition rendered Cybergenic's proposal unacceptable because "CMS did not agree to provide such support in our requirements." AR, Tab 10, SSD at 15. The SSA explained:

This renders their offer unacceptable because I cannot accept an assumption that adversely impacts the Government's requirements by requiring CMS to provide resources that it hasn't agreed to provide. In addition, the second bullet sets a condition for changing their price if we don't meet the requested CMS resource requirements provided in their estimates. This renders their offer unacceptable because I cannot accept a firm-fixed price with this condition that requires CMS to provide resources that CMS has not explicitly agreed to provide and allows the contractor to adjust their price if CMS does not provide such resources.

Id. at 15-16.

A proposal that takes exception to a solicitation's material terms and conditions must be considered unacceptable for award. See, e.g., *Kratos Def. & Rocket Support Servs., Inc.*, B-413143, B-413143.2, Aug. 23, 2016, 2016 CPD ¶ 227 at 5. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. *Id.* Even if a proposal contains an ambiguity as to whether the offeror will comply with a material requirement of the solicitation, the proposal is

rendered unacceptable. *Solers, Inc.*, B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 7 n.6. In addition, where a solicitation requests offers on a fixed-price basis, an offer that is conditional and not firm cannot be considered for award. *Dev Tech. Grp.*, B-412163, B-412163.5, Jan. 4, 2016, 2016 CPD ¶ 10 at 5; see *Advanced Techs. & Labs. Int'l, Inc.*, B-411658 *et al.*, Sept. 21, 2015, 2015 CPD ¶ 301 at 10. We will not disturb an agency's determination of the acceptability of a proposal absent a showing that the determination was unreasonable, inconsistent with the terms of the solicitation, or in violation of procurement statutes or regulation. *Northern Light Prods.*, B-401182, June 1, 2009, 2009 CPD ¶ 117 at 3. Cybergenic has not made such a showing here.

Cybergenic does not deny that CMS correctly understood this assumption; indeed, Cybergenic reiterates that its proposal is premised on the agency committing to assigning a CMS executive team member to provide specific support for this project. See Comments at 1-2. The protester instead argues that this assumption should not be construed as an exception to the terms of the solicitation for two principle reasons.

First, the protester asserts that the assumption merely "provided a baseline for negotiating scope which CMS failed to do in the SOW." *Id.* at 1. The protester argues, in essence, that the agency should not fault Cybergenic because Cybergenic was forced to include this assumption (and the others) because the solicitation was inadequate. As discussed above, a protest based on alleged improprieties in a solicitation that are apparent prior to the time set for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1). The protester did not file a protest asserting that the terms of the RFP were ambiguous or defective before the due date for receipt of proposals; accordingly, this post-award argument regarding the adequacy of the RFP is dismissed as untimely. See *Bluehorse*, B-412494, B-412494.2, Feb. 26, 2016, 2016 CPD ¶ 64 at 3 n.1.

Second, Cybergenic argues that this assumption should not be objectionable because CMS has provided similar resources on the incumbent contracts for enterprise cybersecurity awareness and training program support, such as the one that Cybergenic currently performs as a subcontractor. Comments at 2. As the agency maintains, however, the solicitation here "did not commit such CMS resources." Memorandum of Law at 14.

We find nothing unreasonable in the agency's conclusion that Cybergenic's proposal was unacceptable when the offer was premised on the assumption that the agency would agree to provide resources not identified in the RFP. See *Kratos Def.*, *supra* at 5-6 (concluding that assumption that the agency would provide particular on-site resources to the contractor represented an exception to the solicitation's requirements and rendered proposal unacceptable). Indeed, the agency's determination is entirely consistent with the RFP's warning that the agency "reserves the right to reject any proposal that includes any pricing assumption that adversely impacts the Government's requirements or fails to comply with any of the requirements outlined herein." See RFP at 58.

Notwithstanding its other arguments regarding the reasonableness of this assumption, Cybergenic argues in the alternative that CMS should not have rejected its proposal because the assumption's reference to a change order need not "always affect price" and a change order could instead request other relief like a "no-cost extension." Comments at 2. As discussed above, however, material terms of a solicitation include not only price but also, for example, the delivery of services. See *Kratos Def.*, *supra* at 5. Even assuming that Cybergenic's assumption was limited to the timing of the delivery of the services, the assumption still failed to commit Cybergenic to performing according to the terms of the solicitation. As such, we find nothing unreasonable with the agency's conclusion that this expressed assumption rendered Cybergenic's proposal unacceptable. See *Alpine Cos., Inc.*, B-419831 *et al.*, June 8, 2021, 2021 CPD ¶ 227 at 4 (denying protest regarding assumption that affected "clear timetables for specific deliverables" in the solicitation).

Other Proposal Assumptions

Next, the protester challenges the remaining three assumptions (Nos. 20, 21, and 24) that also rendered Cybergenic's proposal unacceptable. Protest at 8-9. We need not address these challenges in detail because our review of the record provides no basis to question the agency's conclusions regarding those assumptions. See AR, Tab 10, SSD at 16-18. Moreover, even if we were to find any of the agency's conclusions to be unreasonable--which we do not--Cybergenic's proposal would still have properly been found unacceptable because of the project support assumption (No. 11), as discussed above. In sum, because Cybergenic's proposal took exception to the terms regarding the nature of the services to be provided and placed conditions on its price, CMS reasonably concluded that the proposal was unacceptable and Cybergenic ineligible for award. See *Bluehorse*, B-412494, B-412494.2, Feb. 26, 2016, 2016 CPD ¶ 64 at 2. Therefore, these allegations are denied.

Remaining Allegations

Because we deny the challenge to the agency's determination that assumptions within Cybergenic's proposal rendered it technically unacceptable, Cybergenic is not an interested party to raise its arguments challenging additional aspects of its own evaluation or the agency's approach to the price evaluation. An offeror is an interested party if it is an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a)(1); *DMS Int'l*, B-409933, Sept. 19, 2014, 2014 CPD ¶ 278 at 6-7. In this regard, even if we were to conclude that the agency erred in identifying two significant weaknesses in Cybergenic's proposal or performing the price evaluation, the protester would not be in line for award because, for the reasons discussed above, CMS reasonably determined that Cybergenic's proposal was technically unacceptable. See *Dee Monbo, CPA*, B-412820, May 23, 2016, 2016 CPD ¶ 140 at 4 ("Since we find that the agency reasonably determined that [the protester's] proposal was technically unacceptable, it follows that the protester was properly found ineligible for award."). Consequently, the protester is not an interested party to raise any of these challenges,

and they are dismissed. *Coley & Assocs., Inc., B-404034 et al.*, Dec. 7, 2010, 2011 CPD ¶ 6 at 7.

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General Counsel