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Decision

Matter of: Classic Air Charter, Inc.

File: B-421683.4

Date: January 19, 2024

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DIGEST

1. Protest alleging that the amended terms of the solicitation are patently ambiguous is denied where a superseding solicitation amendment resolved any ambiguity.
2. Protest alleging an improper evaluation of accounting system documentation is denied where the protester was afforded an opportunity to respond to the agency's concerns through discussions, and the protest merely anticipates prejudicial agency action.

DECISION

Classic Air Charter, Inc., of Indiatlantic, Florida, protests as patently ambiguous the amended terms of request for quotations (RFQ) No. 70CDCR23Q00000004, issued by the Department of Homeland Security, United States Immigration and Customs Enforcement, for air charter aircraft services. The protester further protests the agency's reevaluation of its quotation pursuant to corrective action taken by the agency in response to previous protests, contending that the agency's reevaluation departs from the terms of the RFQ.

We deny the protest.

BACKGROUND

The procurement at issue is to provide reliable, safe, and secure mass air transportation for noncitizens in federal custody, and to carry out orders for the required departure of

detainees as ordered in removal proceedings. Contracting Officer's Statement (COS) at 1. The agency issued the RFQ on January 23, 2023, in order to establish a single blanket purchase agreement (BPA) for air charter services including aircraft, pilots and crews, guards, nurses, and all personnel, materials, services and other items necessary to provide reliable, safe, and secure mass air transportation of noncitizens in federal custody. *Id.* at 9; Agency Report (AR), Tab 2, RFQ at 2; AR, Tab 4, RFQ attach. 2, Statement of Work (SOW) at 4.

Broadly speaking, the RFQ contemplates two categories of air charter services to be provided. The first category is daily scheduled large aircraft (DSLAs), which entails the provision of aircraft based in Alexandria, Louisiana; Harlingen, Texas; San Antonio, Texas; Miami, Florida; or Mesa, Arizona, with daily scheduled flights to various destinations. SOW at 3. The second category is special high-risk charter, which encompasses flights between the continental United States and locations outside the continental United States for removals that are unable to be served by a DSLA charter flight. *Id.* at 4.

The agency issued the RFQ, using the Federal Supply Schedule procedures of Federal Acquisition Regulation (FAR) subpart 8.4, to holders of multiple award schedule contracts under special item numbers 481211B (Air Charter Services--Brokers) and 481211O (Air Charter Services--Owner Operated).¹ COS at 1; RFQ at 2. The RFQ anticipates the establishment of a single BPA with a 1-year base ordering period and four 1-year option periods. RFQ at 3. Orders will be placed on a fixed-price and time-and-materials basis. *Id.*

The RFQ contemplates a two-phase, advisory down-select procurement process. *Id.* The first phase consists of three factors: acceptability review; corporate experience; and aircraft availability and commitment. *Id.* at 10-11. Following the evaluation of phase one submissions, the agency will issue advisory notifications encouraging the vendors that submitted the most highly rated quotations to participate in phase two. *Id.* at 4. The second phase consists of four factors: technical capability; betterment; past performance; and price. *Id.* at 11-13.

As relevant here, the RFQ instructs vendors as follows with respect to the acceptability review under phase one:

Contractors shall submit the following documents for the [g]overnment to review as part of an acceptability review and verification:

1. An adequate accounting system[;]
2. [Federal Aviation Administration (FAA)] certification(s)[;]
3. Airworthiness [c]ertificates[;]

¹ The Federal Supply Schedule program is also known as the General Services Administration (GSA) schedules program or the multiple-award schedule program. See FAR 8.402(a).

4. FAA operations specifications documentation[;] and
5. GSA contractor certification . . . with a full copy of the GSA Schedule(s)[.]

Id. at 10. The RFQ advises vendors that “[quotations] that do not pass the acceptability review will not be evaluated for the remaining phases/parts or factors.” *Id.* It further advises that during the phase one evaluation, the agency will “evaluate to ensure the contractor has submitted all requirements for the [a]cceptability [r]eview.” *Id.* at 14. Only the adequate accounting system requirement is relevant here.

With respect to the acceptability review’s requirement for an adequate accounting system, the RFQ’s instructions state that vendors “shall provide proof of their company’s adequate accounting system[.]” and that a vendor “must have an adequate accounting system to be eligible for award.” *Id.* at 6. To be adequate, the vendor’s “accounting system must have the ability to substantiate invoices by evidence of actual payment for fuel expenses identified to the benefitting contract.” *Id.*

The agency received multiple timely quotations in response to the RFQ, including from the protester. COS at 9. Following evaluation of phase one submissions, issuance of advisory notices, and subsequent evaluation of phase two submissions, the agency established a BPA with a vendor other than the protester. *Id.* That source selection decision thereafter was the subject of two protests previously filed with our Office. *Id.* In response to those protests, the agency notified our Office of its intention to take corrective action, and we consequently dismissed the protests as academic. See *Classic Air Charter, Inc.*, B-421683, June 21, 2023 (unpublished decision); *CSI Aviation, Inc.*, B-421683.2, June 21, 2023 (unpublished decision).

As part of its corrective action, the agency reviewed all quotations against the criteria set forth in the RFQ’s acceptability review provisions, as the agency concluded that it had failed to conduct and document an adequate acceptability review. COS at 10; AR, Tab 42, Corrective Action Memo at 2. As a result of that review, the agency found that the protester’s quotation did not demonstrate the adequacy of its accounting system. Specifically, it did not demonstrate that the protester’s accounting system has the ability to substantiate invoices by evidence of actual payment for fuel expenses identified to the benefitting contract. COS at 10; AR, Tab 43, Acceptability Review at 2.

On October 17, 2023, the agency issued a discussion letter to the protester, identifying a number of aspects of the protester’s quotation under both phase one and phase two factors that “lower[ed] the [g]overnment’s confidence.” COS at 11; AR, Tab 44, Discussion Letter. Among those aspects were the agency’s conclusions discussed above with respect to the protester’s accounting system. AR, Tab 44, Discussion Letter at 2.² The protester submitted questions regarding its discussion letter on October 19. COS at 11. The agency responded on October 27, clarifying, in part, that the protester’s accounting system documentation did not lower the agency’s confidence;

² Page references to this document are to the Adobe PDF page numbers.

rather, the agency had identified “issues . . . in [the protester’s] accounting system documentation submission[,]” and was permitting the protester “to address the aspects noted.” AR, Tab 53, Questions and Answers at 1.

Also on October 17, the agency issued the third amendment to the RFQ. COS at 11; AR, Tab 45, Amendment Three. In relevant part, the amendment provides updated instructions regarding the submission of pricing information. As initially issued, the RFQ includes the following instructions with respect to the pricing narrative:

The pricing narrative should contain a mapping to the GSA rates and identify any applicable discounts. All rates shall reflect total compensation for the services in accordance with the Contractor’s GSA Schedule. Contractors must input their (1) GSA rate, (2) discount percentage, and (3) proposed rates. The Government is seeking a price reduction from the established prices in their GSA Schedule contracts. The Government will not establish a BPA with a contractor whose proposed rates exceed the pricing listed on its GSA Schedule contract.

RFQ at 13. The third amendment provides an update to those instructions as follows:

Updated Pricing: Please use Pricing Spreadsheet (10.10.23 version) and your corresponding Pricing Narrative (limit of 10 pages), to submit updated pricing. Please note updated clauses in Terms and Conditions (Attach. 1 dated 9.5.23) and Wage Determinations (Attach. 8) issued with this Amendment. Quoters shall explain in the Pricing Narrative how the DSLA exclusive use [contract line item number (CLIN)] plus (+) the flight hour price plus (+) fuel equals (=) your approved GSA Schedule pricing. See other RFQ instructions re: Pricing at RFQ p. 12-13 under Section A.8. Quoters may present this as [[percentage] of DSLA exclusive use] + [Flight Hour rate] + [Estimated Fuel] = [GSA rate] multiplied (x) by [percent] Discount, or in another way that is understandable so that ICE can compare your quoted price to your GSA Schedule pricelist. Please note that the CLIN structure in this BPA is for the Government’s purposes of obligating and organizing funds for invoicing. Quoters are being asked in this Amendment to update your Price Narrative to demonstrate how the dry pricing in your BPA quote aligns with wet pricing on your GSA pricelist.^[3]

In accordance with FAR 8.405-4, the Government is again asking for price reductions in your final quote submissions.

AR, Tab 45, Amendment Three at 3.

³ Under a “wet” aircraft lease, the lessor of the aircraft provides the flight crew. By contrast, under a “dry” lease, the lessor does not provide the flight crew.

On October 26, the protester filed this protest with our Office. The next day, the agency issued the fourth amendment to the RFQ. COS at 11; AR, Tab 51, Amendment Four. The amendment, which states that it provides “[a]dditional [c]larification regarding Amendment 3[.]” states, in relevant part, as follows:

Quoters will be responsible for submitting pricing information in a way that is understandable for the Government. In the pricing narrative, the quoter should explain how its quoted price is compliant with its parent GSA Schedule pricelist. If a quoter is utilizing a GSA wet lease rate, the pricing narrative should clearly explain what is included in their GSA wet lease rate as well as the type of aircraft. If the quoter is utilizing a GSA dry lease rate, the pricing narrative should clearly explain what is included in their GSA dry lease rate as well as the type of aircraft. If the Quoter’s GSA lease rate contains fuel, the Quoter should clearly explain how they calculated and removed the cost of the fuel from the GSA lease rate.

AR, Tab 51, Amendment Four at 3.

On November 3, the protester submitted a revised quotation to the agency. COS at 11. The agency’s evaluation of quotations is ongoing, and the agency has not yet made a source selection decision. *Id.* at 11-12.

DISCUSSION

The protester raises two principal challenges. First, the protester argues that the third amendment introduces a patent ambiguity to the RFQ because it appears to require vendors to include the cost of fuel in their DSLA rates. The protester argues that the third amendment thus contradicts other RFQ terms, which state that fuel is not to be included in the flight hour rate, and that fuel will be invoiced based on actual costs. Second, the protester alleges that the agency’s evaluation of its accounting system documentation is unreasonable and not in accordance with the RFQ’s terms.⁴

Patent Ambiguity

The protester first alleges that the third amendment to the RFQ introduces a patent ambiguity with respect to whether DSLA rates are to include fuel costs. Protest at 12-23. In particular, the protester cites the RFQ’s initial instructions, which require vendors to include their GSA rate, discount percentage, and quoted rates, and notify them that their quoted rates must not exceed their GSA rates. Protest at 13 (quoting RFQ at 13). The protester then points to the SOW, which states with respect to DSLA fixed flight hour rates that “[f]uel shall not be included in the flight hour rate[.]” and further that “[f]uel expenses will be invoiced at actual costs to the contractor and paid

⁴ The protester raises several collateral arguments not addressed in this decision. While we do not discuss them in the decision, we have considered each of them and conclude that none of them provides a basis to sustain the protest.

under a time-and-materials CLIN by the [g]overnment.” SOW at 7, 10; see also Protest at 13 (quoting *id.*). Accordingly, the protester argues the RFQ as initially issued makes clear that vendors are not to include fuel costs in their quoted rates.

The protester contends that the third amendment contradicts these terms and those of the SOW, which state that fuel is not to be included in the flight hour rates under the BPA to be established and were not changed by the amendment. The protester specifically cites the third amendment’s instructions to “explain in the Pricing Narrative how the DSLA exclusive use CLIN plus (+) the flight hour price plus (+) fuel equals (=) your approved GSA Schedule pricing[,]” as well as the provided example formula of “[percentage] of DSLA exclusive use] + [Flight Hour rate] + [Estimated Fuel] = [GSA rate] multiplied (x) by [percent] Discount[.]” Protest at 12, 14-15, 17. The protester argues that, as amended, the RFQ thus is internally contradictory and unclear whether vendors are to include the cost of fuel in their quoted rates, rendering the RFQ patently ambiguous. *Id.* at 15.

The agency responds, in part, that the protester’s concerns about ambiguity have been resolved by the issuance of the fourth amendment to the RFQ. Memorandum of Law (MOL) at 18. The agency points out that the subsequently issued fourth amendment provides additional clarifications regarding the third amendment, making clear that the purpose of the pricing narrative is to permit the agency to determine that vendors’ quoted rates are consistent with their GSA rates, and that if a vendor’s GSA rates include the cost of fuel, the vendor is to demonstrate how it removed those costs in formulating its quoted rates. *Id.*

As we previously have stated, a solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. *Windsor Sol.*, B-415840, Mar. 23, 2018, 2018 CPD ¶ 118 at 4. In view of that standard, to the extent that the third amendment introduced an ambiguity into the RFQ regarding the inclusion of fuel costs in quoted rates, we agree with the agency that any such ambiguity has been resolved by the fourth amendment. As that amendment makes clear, a vendor is to submit a pricing narrative that “explain[s] how its quoted price is compliant with its parent GSA Schedule pricelist.” AR, Tab 51, Amendment Four at 3. Thus, the fourth amendment clarifies that the purpose of the pricing narrative is to permit the agency to determine that a vendor’s quoted rates are consistent with its GSA schedule contract rates. The fourth amendment further clarifies that the agency is concerned with ensuring that it can determine the consistency of vendors’ quoted prices on an apples-to-apples basis, *i.e.*, that the agency has visibility into the components of both the GSA rates and the quoted rates.

To that end, the fourth amendment requests that vendors clearly explain what is included in their GSA schedule rates, whether those rates are “wet” or “dry.” *Id.* Additionally, if a vendor’s GSA schedule rates include the cost of fuel, the vendor is to provide a clear explanation of how it removed fuel costs in arriving at its quoted rates. *Id.* This is consistent with the SOW provisions cited by the protester, which state that the cost of fuel is not to be included in flight hour rates and will be invoiced at actual

costs incurred. Thus, as amended, we conclude that the RFQ is not ambiguous with respect to whether vendors' flight hour rates are to include the cost of fuel. We therefore deny this protest allegation.

Accounting System Evaluation

The protester also alleges that the agency has departed from the RFQ's evaluation criteria with respect to the protester's accounting system documentation. Protest at 23-29. The protester's argument principally takes two tacks, which we discuss in turn.

First, the protester points out that the discussion letter provided to the protester following the agency's corrective action in response to the prior protests states that the agency "has established a competitive range and is conducting discussions." *Id.* at 24 (quoting AR, Tab 44, Discussion Letter at 1). Because the RFQ states that quotations that do not pass the acceptability review--including the requirement to demonstrate an adequate accounting system--will not be evaluated further, and the discussion letter indicates that the protester's quotation was included in the competitive range, the protester argues that it necessarily follows that the agency concluded that the protester's quotation had demonstrated an adequate accounting system. *Id.* at 25. Thus, the protester contends, the agency's evaluation of the protester's accounting system documentation as failing to demonstrate adequacy, as articulated in the discussion letter, departed from the RFQ's evaluation criteria. *Id.*

The agency responds--and we agree--that the protester's assumption that the agency necessarily must have determined the protester to have submitted adequate accounting system documentation is not borne out by the record. See MOL at 23. As discussed above, the agency determined as part of its corrective action in response to prior protests that it had failed to conduct and document an adequate acceptability review in accordance with the RFQ. See AR, Tab 42, Corrective Action Memo at 2. As discussed in more detail below, the agency determined that the information submitted by the protester did not demonstrate that the protester has an adequate accounting system. See AR, Tab 43, Acceptability Review at 2. Thus, contrary to the protester's assumption, the record shows that the agency reviewed the protester's accounting system documentation as contemplated by the RFQ and found it failed to satisfy requirements. Moreover, to the extent the protester contends that the RFQ prohibits the agency from including the protester's quotation in the competitive range in the absence of a determination that the protester's accounting system documentation was adequate, the protester cannot demonstrate any competitive prejudice. If the agency erred by including the protester's quotation in the competitive range despite concluding that the protester's quotation failed to demonstrate an adequate accounting system, it is clear that any such error redounded to the benefit--not the prejudice--of the protester.⁵

⁵ The agency contends that the RFQ allows the agency discretion whether to exclude a quotation from the competition for the failure to demonstrate an adequate accounting
(continued...)

Secondarily, the protester argues that the agency's concerns regarding the documentation of the protester's accounting system are unreasonable. Protest at 26-29. Relevant to this allegation, the RFQ requires the selected contractor's accounting system to "have the ability to substantiate invoices by evidence of actual payment for fuel expenses identified to the benefitting contract." RFQ at 6. To demonstrate that ability, vendors may submit either: (1) a copy of a written determination of an adequate accounting system from the cognizant federal agency official; or (2) a review by a public accounting firm "stat[ing] that the accounting system complies with the requirements applicable to this contract type in Standard Form 1408 'Pre-award Survey of Prospective Contractor Accounting System'." *Id.*

The protester elected to use the second method to demonstrate the adequacy of its accounting system. In its quotation, dated January 27, 2023, the protester stated that it had "commissioned a [certified public accountant] to review our [a]ccounting [s]ystem to determine whether our firm was in compliance with federal government accounting requirements." AR, Tab 11, Accounting System Documentation at 2. The protester included a copy of the resultant report, which is dated June 10, 2020.⁶ *Id.* at 4-5.

Relevant to the protest, the report stated that the protester's "current accounting system is not accumulating costs to accurately reflect the proper cost benefit relationships between the costs incurred and the final cost objectives. The costs are not currently accumulated by CLIN." *Id.* at 4. Additionally, the accounting firm had:

[R]eviewed the system for compliance with current FAR and [Defense Federal Acquisition Regulation Supplement] requirements regarding proper accumulation of costs to compute accurate indirect rates[, and] . . . determined [that] cost[s] are not being accumulated properly to compute accurate indirect rates due to the following:

system. MOL at 23-24. As discussed more fully below, the RFQ permits a vendor to demonstrate the adequacy of its accounting system through one of two methods: (1) a copy of a written determination of an adequate accounting system from the cognizant federal agency official; or (2) a review by a public accounting firm. RFQ at 6. The agency points to language in the RFQ regarding the latter method stating that "[c]ontractors not providing this proof *may* be found ineligible for award" in support of its position that elimination of a quotation from the competition for failure to demonstrate an adequate accounting system is discretionary under the terms of the RFQ. MOL at 24 (quoting RFQ at 6) (emphasis added by agency). The agency's argument, however, ignores the RFQ's statement that "[q]uot[at]ions that do not pass the acceptability review"--including the requirement to demonstrate an adequate accounting system--"will not be evaluated for the remaining phases/parts or factors." RFQ at 10.

⁶ This document did not utilize Standard Form 1408.

1. The costs are not segregated into homogenous pools for [f]ringe, [o]verhead, and [general and administrative expenses.]
2. The costs are not segregated for [u]nallowable costs per the FAR.
3. Labor costs are not segregated into direct and indirect labor charges for all employees.

Id.

The accountant also made a number of recommendations, *see id.* at 5, which the protester's quotation stated had been implemented, *see id.* at 2.

Citing the accountant's findings discussed above, the agency determined that the protester's quotation "does not demonstrate that the contractor's accounting system has the ability to substantiate invoices by evidence of actual payment for fuel expenses identified to the benefitting contract[.]" AR, Tab 43, Acceptability Review at 2, and informed the protester of that concern and the basis therefor in a discussion letter, *see* AR, Tab 44, Discussion Letter at 2.

The protester contends that the agency's evaluation of its accounting system documentation is unreasonable because the cited findings do not have any bearing on whether the protester's accounting system can substantiate invoices by evidence of actual payment for fuel expenses identified to the benefitting contract. Protest at 27. The protester argues that neither the ability to track the relationship between costs incurred and cost objectives nor the accumulation of costs to compute accurate indirect rates is pertinent to whether the protester's accounting system can identify and relate fuel costs--which are direct costs under the BPA to be established--to the benefitting contract. *Id.* Rather, the protester contends, its quotation demonstrated that the protester's accounting system meets the standard articulated in the RFQ through its citation of the protester's accurate invoicing under the predecessor contract. *Id.* at 27-28.

The agency responds, in part, that the protester cannot demonstrate prejudice because it has been provided an opportunity to respond to the agency's concerns regarding its accounting system through discussions, pursuant to which the protester has submitted a revised quotation. MOL at 26-27. Furthermore, as the agency's evaluation of the protester's revised quotation is not yet completed, the agency argues that this protest ground is prematurely asserted. *Id.* at 26.

To whatever extent the agency's determination that the protester's quotation failed to demonstrate an adequate accounting system was unreasonable, we conclude that it provides no basis to sustain the protest. As the agency points out, it has notified the protester of its concerns regarding the protester's accounting system documentation and provided the protester with an opportunity to respond to those concerns through discussions, an opportunity of which the protester has availed itself through the submission of a revised quotation. Thus, if the protester believes that the agency's concerns are unfounded because they are based on irrelevant information contained in

the protester's quotation, the protester has had an opportunity to revise that information in its quotation or otherwise defend the adequacy of its accounting system with respect to the specific requirements established in the RFQ.⁷ Competitive prejudice is an essential element of every viable protest. *CBF Partners JV, LLC*, B-419846.2 *et al.*, Dec. 14, 2021, 2022 CPD ¶ 10 at 13. Here, where the protester has been afforded an opportunity to address the agency's concerns regarding its accounting system documentation, it cannot demonstrate that it has been prejudiced by the agency's initial evaluation of that documentation.

Moreover, to the extent the protester asserts that the agency's concerns identified in the discussion letter indicate that the agency will not evaluate the protester's revised quotation in accordance with the RFQ, that allegation merely anticipates prejudicial agency action and is, therefore, speculative and premature. *See, e.g., Skyward IT Sols., LLC*, B-421561.10, Oct. 10, 2023, 2023 CPD ¶ 269 at 7; *DGC Int'l*, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3. We assume that agencies will conduct procurements in a fair and reasonable manner in accordance with the terms of the solicitation, and our Office will not consider a protest allegation which speculates that an agency will not evaluate proposals in the manner set forth in the solicitation. *Paramount Group, Inc.*, B-298082, June 15, 2006, 2006 CPD ¶ 98 at 6-7.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁷ Indeed, to that end, the protester's accounting system documentation includes, in addition to the June 2020 accountant's report, copies of engagement letters from two other accounting firms "to again determine whether our [a]ccounting [s]ystem meets the requirements of a federal government contract system billing [o]ther [d]irect [c]osts and fuel charges and reimbursable items (the type of contract advertised in the [s]olicitation)." AR, Tab 11, Accounting System Documentation at 2, 6-10, 24-32. The documentation further contains the protester's representation that "[t]hose reviews should be completed within the next 30 days" after January 27, 2023, and that "implementation of any recommendations will be completed well before the planned award date for this contract of March 31, 2023." *Id.* at 2. While the protester's November 3, 2023, revised quotation is not in the record before us, presumably the documents resulting from those additional reviews were available to the protester when it submitted its revised quotation.