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Decision

Matter of: JCS Solutions, LLC

File: B-422249

Date: March 13, 2024

Laurel A. Hockey, Esq., and Daniel Strouse, Esq., Cordatis LLP, for the protester. Debra J. Talley, Esq., and Alex M. Cahill, Esq., Department of the Army, for the agency. Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging the terms of the solicitation improperly provide for a lowest-price, technically acceptable source selection process is denied where the solicitation provides for a comparative assessment of past performance.

DECISION

JCS Solutions, LLC, an 8(a) small business of Fairfax, Virginia, protests the terms of request for proposals (RFP) No. W519TC-23-R-0111, issued by the Department of the Army, for program management support for the Arlington National Cemetery customer care support center. The protester contends that the solicitation improperly provides for a lowest-price, technically acceptable (LPTA) source selection process in violation of the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS).

We deny the protest.

BACKGROUND

On November 3, 2023, the Army issued the solicitation under the General Services Administration's (GSA's) 8(a) Streamlined Technology Acquisition Resource for

Services III governmentwide acquisition contract.¹ Agency Report (AR), Tab 1, Contracting Officer's Statement (COS) and Memorandum of Law (MOL) at 2-3. The solicitation, which was issued in accordance with FAR section 16.505, contemplates the issuance of a fixed-price task order with a 1-year base period (including a 30-day transition period) and four, 1-year option periods.² *Id.* at 3. The due date for proposals was December 13, 2023. *Id.* at 9

The solicitation provides for the evaluation of proposals in three steps. AR, Tab 17, RFP amend. 0003. at 14. Under step one, the agency will conduct a technical evaluation of the five lowest-priced proposals on an acceptable/unacceptable basis. *Id.* From this pool of proposals, the agency will select the three lowest-priced, technically acceptable proposals to proceed to step two. *Id.* Under step two, the agency will evaluate the recency and relevancy of an offeror's submitted past performance references and then assign the proposal an overall confidence rating of no confidence, limited confidence, neutral confidence, satisfactory confidence, or substantial confidence.³ *Id.* The agency will also conduct a price reasonableness analysis under this step. *Id.* at 16. Only the proposals with a fair and reasonable price and a past performance rating of "substantial confidence" will be permitted to move on to step three.⁴ Under step three, the agency will issue the task order to the lowest-priced, technically acceptable proposal that receives a rating of substantial confidence in past performance. *Id.*

On December 12, prior to the due date for proposals, JCS filed a protest with our Office challenging the terms of the solicitation. Protest at 1. In its protest, JCS alleged (1) the terms of the solicitation were contradictory regarding the source selection process in that the RFP provided for the issuance of the task order on both a best-value tradeoff

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.

² The agency amended the solicitation three times prior to the filing of this protest. COS/MOL at 3-4. All citations are to the final, amended version.

³ As relevant here, a rating of substantial confidence indicates that the agency has a high expectation that the offeror will successfully perform the required effort. RFP amend. 0003 at 16.

⁴ If there are fewer than two proposals that receive a rating of substantial confidence in past performance with a fair and reasonable price, the agency will then evaluate the past performance references and cost/price of the next lowest-priced, technically acceptable proposal until there are two proposals with a past performance rating of substantial confidence and a fair and reasonable evaluated price. RFP amend. 0003 at 14. If there are no additional technical proposals to evaluate at step one, the solicitation provides that the agency may proceed to step three. *Id.*

basis and an LPTA basis, (2) the solicitation improperly provided for an LPTA source selection process in violation of the FAR and DFARS, and (3) the solicitation failed to request professional compensation plans from offerors. See *id.* at 10-21. On January 11, 2024, the agency requested dismissal of the protest on the basis that it intended to take corrective action. AR, Tab 27, Notice of Corrective Action at 2. Specifically, the agency explained that it would amend sections M and L of the solicitation to delete any reference to a best-value tradeoff source selection process. *Id.* at 1-2. The agency also stated that it would delete a portion of section M that provided that the agency reserved the right to make a “best[-]value award decision” and issue the task order to an offeror other than one whose proposal received a rating of substantial confidence in past performance. *Id.* at 1.

The protester objected to the agency’s request for dismissal on the basis that it did not render the entire protest academic, namely the protest grounds asserting that the solicitation improperly provided for an LPTA source selection process and that the agency failed to request professional compensation plans. AR, Tab 28, JCS Objection to Corrective Action at 3-4. Our Office denied the agency’s request for dismissal and requested the agency submit an agency report in response to the two remaining protest grounds referenced by JCS.⁵ COS/MOL at 1.

DISCUSSION

JCS, which is the incumbent contractor, alleges that the solicitation improperly provides for an LPTA source selection process in violation of the FAR and DFARS. Comments at 2. Specifically, JCS contends that the solicitation does not provide for a comparative assessment of proposals. For reasons discussed below, we deny the protest.⁶

Our Office has stated consistently that the contracting agency has the primary responsibility for determining its needs and the best method of accommodating them. *Sterisyn, Inc.*, B-418366 *et al.*, Apr. 1, 2020, 2020 CPD ¶ 114 at 7. Thus, it is the

⁵ JCS, in its comments on the agency report, withdrew its protest ground alleging that the agency failed to request professional compensation plans. Comments at 2. Accordingly, the only remaining protest ground is the protester’s allegation that the solicitation improperly provides for an LPTA source selection process in violation of the FAR and DFARS. See *id.*

⁶ The agency represents that the anticipated value of this task order will exceed \$10 million. COS/MOL at 2 n.2. Accordingly, this protest is within our jurisdiction to hear protests of task orders valued in excess of \$10 million placed under civilian agency indefinite-delivery, indefinite-quantity (IDIQ) contracts. 41 U.S.C. § 4106(f)(1)(B); *Alliant Sols., LLC*, B-415994, B-415994.2, May 14, 2018, 2018 CPD ¶ 173 at 4 n.8. The authority under which we exercise our task order jurisdiction is determined by the agency that awarded the underlying IDIQ task order contract, which in this instance is GSA. *Alliant Sols., LLC, supra.*

protester's obligation to establish the solicitation violated applicable procurement laws or regulation. *Id.*

Here, JCS contends that the solicitation sets forth an LPTA source selection process in violation of DFARS section 215.101-2-70(a)(1).⁷ Protest at 14. The agency responds that the solicitation does not provide for an LPTA source selection process as it requires a comparative assessment of past performance. COS/MOL at 13. According to the agency, the assignment of a confidence rating based on the recency and relevancy of past performance references is, by definition, a comparative assessment because it does not use a pass/fail rating system. *Id.* at 15. JCS disputes this interpretation, arguing that the agency's use of a confidence rating scale is only a qualitative assessment, not a comparative assessment. Comments at 4 n.3.

Based on the record, we have no basis to conclude that the solicitation provides for an LPTA source selection process. Section 16.505 of the FAR does not explain how to treat past performance when placing orders using an LPTA source selection process;

⁷ DFARS section 216.505(b)(1)(A) provides that the limitations and prohibitions on the use of the lowest price technically acceptable source selection process enumerated in DFARS section 215.101-2-70 are applicable to orders placed against multiple award indefinite delivery contracts. In this regard, DFARS section 215.101-2-70(a)(1) authorizes defense agencies to use an LPTA source selection process only when the following eight criteria are met:

- (i) Minimum requirements can be described clearly and comprehensively and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;
- (ii) No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;
- (iii) 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;
- (iv) The source selection authority has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit;
- (v) No, or minimal, additional innovation or future technological advantage will be realized by using a different source selection process;
- (vi) Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life [];
- (vii) The contract file contains a determination that the lowest price reflects full life-cycle costs []; and
- (viii) The contracting officer documents the contract file describing the circumstances justifying the use of the lowest price technically acceptable source selection process.

The FAR imposes a similar limitation on the use of LPTA procurements. See FAR 15.101-2(c) and (d).

we therefore turn to FAR part 15 for guidance. Section 15.101-2(b) of the FAR provides that if an agency uses an LPTA source selection process and the contracting officer elects to use past performance as an evaluation factor, past performance is to be evaluated in accordance with FAR section 15.305, but the comparative assessment in FAR section 15.305(a)(2)(i) does not apply. *Id.* Section 15.305(a)(2)(i) provides that the comparative assessment of past performance information is separate from the responsibility determination required under FAR subpart 9.1. In other words, if the agency proceeds with an LPTA source selection process and intends to evaluate past performance, the FAR does not anticipate a comparative assessment of past performance. Conversely, if there is a comparative assessment of past performance, the source selection process is not an LPTA. As outlined above, the issue presented in this protest concerns the definition of the term “comparative assessment.”

Other than explaining that the “currency and relevance of the information, source of the information, context of the data, and general trends in contractor’s performance shall be considered” as part of the comparative assessment of past performance and indicating that this assessment is separate from the responsibility determination required under FAR subpart 9.1, FAR section 15.305(a)(2)(i) does not provide guidance as to what is meant by a comparative assessment of past performance.

Although JCS contends that a comparative assessment requires the agency to compare proposals to determine whether any discriminators exist, Comments at 4, we do not think that the FAR requires a comparison of proposals to one another under section 15.305, which pertains to the evaluation of individual proposals against the evaluation criteria. Rather, in the context of FAR section 15.305(a)(2), a comparative assessment of past performance can include evaluating past performance on a scale, rather than on the basis of a pass/fail assessment. In reaching this conclusion, we note that our Office has interpreted the term “comparative assessment,” or “comparative evaluation,” to include circumstances when “competing proposals will be rated on a scale relative to each other, rather than on a pass/fail basis.” *Beck’s Spray Serv., Inc.*, B-299599, June 18, 2007, 2007 CPD ¶ 113 at 5. Because the solicitation here provides for the evaluation of past performance on a scale, which includes possible ratings of no confidence, limited confidence, neutral confidence, satisfactory confidence, or substantial confidence, we conclude that the solicitation does not provide for an LPTA source selection process.

The protest is denied.

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General Counsel