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Decision

Matter of: Pate Construction Co., Inc.

File: B-410211

Date: November 17, 2014

Ryan J. Klein, Esq., Sherman & Howard LLC, for the protester.
Christopher S. Cole, Esq., Department of the Air Force, for the agency.
Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the terms of a solicitation contained a latent ambiguity is dismissed as untimely where the ambiguity is patent and was not challenged prior to the closing time for receipt of proposals.
 2. Protest challenging the propriety of an agency's evaluation is denied where the evaluation was consistent with the criteria set forth in the solicitation.
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DECISION

Pate Construction Co., Inc., of Pueblo West, Colorado, protests the award of a contract to NM Industries, LLC (NMI), of Denver, Colorado, under request for proposals (RFP) No. FA7000-14-R-0012, issued by the Department of the Air Force for the repair of high-temperature hot water lines located at the United States Air Force Academy in Colorado Springs, Colorado. Pate argues that the RFP was latently ambiguous, that the Air Force improperly evaluated proposals, and that the awardee's price was unreasonably low.

We dismiss the protest in part and deny it in part.

BACKGROUND

The RFP, issued on May 9, 2014, solicited proposals to replace existing underground high temperature hot water lines serving the cadet area and community center at the United States Air Force Academy in Colorado Springs, Colorado. RFP at 1. Drawings included with the RFP indicated that the work was

to be performed in a single straight-line area that, at one point, crossed an existing street (West Douglass Drive). See RFP, Drawing M-107 at 1. The RFP contemplated a single contract with two contract line item numbers (CLINs), as follows:

0001 Repair HTHW [High Temperature Hot Water] Phase 2

Furnish all labor, materials, transportation, and supervision for a complete and functional project in accordance with Project XQPZ 07-0303B, specifications and drawings to replace existing underground high temperature hot water piping serving the cadet area and community center with new piping, to include new insulation, expansion loops and new concrete vaults.

0002 Directional Bore Two (2) new 8 [inch] mains

Furnish all labor, materials, transportation, and supervision for a complete and functional project in accordance with Project XQPZ 07-0303B, specifications and drawings to replace existing underground high temperature hot water piping serving the cadet area and community center with new piping, to include directional bore two (2) new 8" HTHW mains into place under West Douglass Drive.¹

RFP at 3.

The RFP stated that the total price to be evaluated would be the sum of the two CLIN prices, and that the total price was estimated to be between \$5 million and \$10 million. RFP at 1, 30, 36.

The RFP provided for an evaluation approach under which the agency would first rank all of the proposals by price. RFP at 36. Then, the agency would consider past performance and select an awardee in the following manner:

If the lowest priced evaluated proposal is judged to have a "Substantial Confidence" performance confidence assessment, that offer represents the best value for the government and the evaluation process stops at this point. . . . If the lowest priced offeror is not judged to have a "Substantial Confidence" performance confidence assessment, the next lowest priced offeror will be evaluated and the

¹ The agency states that the reason the RFP included a separate CLIN for boring under West Douglass Drive, rather than placing the pipe by trenching, as would be done for the remainder of the project, was that West Douglass Drive had been recently repaved. Contracting Officer (CO) Statement (COS) at 1.

process will continue (in order by price) until an offeror is judged to have a “Substantial Confidence” performance assessment or until all offerors are evaluated. If all offerors are evaluated then the Source Selection Authority shall then make an integrated assessment best value award decision.

RFP at 39.

The Air Force received proposals from five offerors, including Pate and NMI. COS at 3. NMI submitted the lowest-priced proposal and Pate submitted the highest-priced proposal. Id. Because NMI’s proposal was the lowest in price, its past performance was evaluated by the agency. AR, Tab 9, Proposal Analysis Report, at 10-16. The agency assigned NMI a past performance assessment of substantial confidence, and, in accordance with the RFP evaluation scheme, awarded the contract to NMI without evaluating the past performance of the other offerors. After being debriefed, Pate filed this protest.

DISCUSSION

Pate first argues that the RFP contains a latent ambiguity. Pate contends that while it interpreted the RFP to require each CLIN to include separate, full pricing for the entire work, the agency stated in Pate’s debriefing that the pricing for CLIN 0002 was to encompass only the extra work of boring under West Douglass Drive. Protest at 7. Specifically, Pate argues that the language in both CLINs requiring offerors to “[f]urnish all labor, materials, transportation and supervision for a complete and functional project” could mean that each CLIN stands alone as its own project, and that the price of each CLIN should therefore include the total cost of the project. In contrast, the agency argues that the RFP, when read as a whole, indicates that CLIN 0001 and CLIN 0002 are different parts of one basic contract, not separate requirements to be included in a price proposal that would, in effect, price the full scope of repair twice. COS at 4.

We need not resolve whether the protester’s reading of the solicitation is the only reasonable interpretation because, to the extent we agree that the provisions were susceptible to more than one reasonable interpretation, we find the ambiguity is patent. Although Pate contends that the ambiguity is latent, it acknowledges in its protest that when the RFP is read as a whole “there is more than one reasonable interpretation . . . ; therefore, the [RFP] is ambiguous.” Protest at 9.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Tele-Consultants, Inc., B-408465 et al., Sept. 27, 2013, 2014 CPD ¶ __ at 11. An ambiguity exists if a provision is susceptible to more than one reasonable interpretation that is consistent with the solicitation, when read as a whole. Poly-Pacific Techs., Inc., B-293925.3, May 16,

2005, 2005 CPD ¶ 100 at 3. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error; for example, where solicitation provisions appear inconsistent on their face. NCS Techs., Inc., B-406306.3, Sept. 17, 2012, 2012 CPD ¶ 259 at 4. In such situations, an offeror may not simply make unilateral assumptions regarding the meaning of patently ambiguous terms in the solicitation and then expect relief when the agency does not act in the manner assumed. Rather, the offeror must challenge the alleged ambiguity prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (2014); see Envtl. Sys. Research Inst., Inc., B-408847.2, Jan. 17, 2014, 2014 CPD ¶ 53 at 5. Where a patent ambiguity is not challenged prior to submission of quotations, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations as the only permissible interpretation. U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

In our view, reading the CLINs together with other portions of the RFP reasonably leads to the conclusion that both CLINs are needed to form the basis for the single water line repair project. For example, sections L and M of the RFP each state that the agency intends to award a single contract for both CLINs. RFP at 30, 36. Thus, these two sections appear to indicate that the two CLINs are part of a single requirement, with specific separate components, rather than two different requirements that require, in essence, pricing the full project twice. Furthermore, the RFP drawings indicate that, rather than two separate projects, the work to be performed involves replacing piping in a single linear area that crosses West Douglass Drive at one point. RFP, Drawing M-107 at 1. CLIN 0002 specifically references the type of work to be performed in the area where the piping would cross West Douglass Drive. Id. Finally, the RFP states that the total price to be evaluated will consist of the sum of the two CLIN prices, and in two other places, notes that the expected magnitude of the total price is estimated to be between \$5 million and \$10 million.² RFP at 1, 30, 36.

Although we think the agency's reading of the RFP is more persuasive than Pate's, and although we note that all of the other offerors read this solicitation in the same manner as the agency, we believe Pate has also proffered a reasonable reading of the texts of the two CLINs. As a result, we conclude that the ambiguity was patent, not latent. Since the protester failed to raise this patent ambiguity prior to the

² All of the price proposals, including Pate's, included the price for the full scope of repair in CLIN 0001. See AR, Tab 7, Abstract of Offers. For CLIN 0001, the range of prices for all five offerors was between \$6,044,900 and \$7,658,669. Id. at 1. For CLIN 0002, the range of prices for the four other offerors was between \$66,070 and \$134,048.02, whereas Pate's CLIN 0002 price was [deleted]. Id. Pate's proposed total price for both CLINs exceeded even the upper range of the RFP's published estimated total price by more than [deleted].

receipt of proposals, we dismiss this protest ground as untimely. U.S. Facilities, Inc., supra.

The protester also contends that the agency improperly made award on a lowest-price, technically-acceptable basis, rather than a best-value basis.³ Protest at 9. Pate does not challenge the agency's evaluation of NMI's past performance, but argues that the agency should have conducted "an evaluation of all offerors' price and past performance proposals to make price/technical tradeoffs." Protest at 11. Pate's understanding of the basis for award established in the RFP appears, in this regard, to be mistaken.

As set forth above, the RFP indicated that the agency would first rank the offers by price, and that the lowest-priced offer would represent the best value if its past performance was assessed as providing substantial confidence. RFP at 39. Not only is Pate mistaken about its contention that to reach a best-value decision, the agency was required to evaluate Pate's past performance and perform a tradeoff, but even if Pate had received the highest possible past performance confidence rating, as did NMI, Pate's proposal would still have been higher-priced. Thus, in accordance with our decision in Savee Consulting, Inc., B-408416.3, Mar. 5, 2014, 2014 CPD ¶ 92 at 7, no tradeoff was necessary for an award to be made on a best-value basis. Here, the agency determined that the lowest-priced offeror, NMI, had a substantial confidence past performance assessment, and made award to NMI without evaluating the past performance of the other offerors. AR, Tab 10, Source Selection Decision Document, at 7.

The agency's evaluation approach is consistent with the terms of the RFP. Accordingly, this aspect of the protest is denied.

The protest is dismissed in part and denied in part.

Susan A. Poling
General Counsel

³ Additionally, Pate argues that NMI's CLIN 0002 price must have been unreasonably low because it did not include the full scope of repair, and, therefore had to be viewed as indicating NMI's lack of understanding, or constituting excessive risk. Pate states that its contention is based solely upon its reading of the RFP as requiring the price for CLIN 0002 to include the full scope of repair. Protest at 11. Because we have concluded that the RFP was patently ambiguous with respect to how the two CLINs were to be priced, we do not address this ground of protest.