



United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Shivoy, Inc.

File: B-412027; B-412027.2

Date: December 9, 2015

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Elizabeth Amato, Esq., Defense Logistics Agency, for the agency.

Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the protester's proposal as technically unacceptable and ineligible for award is denied where any ambiguity regarding whether offerors were required to provide copies of certifications for non-key personnel prior to award was patent, rather than latent.

2. Protest alleging that the agency's discussions were misleading is denied where the information giving rise to the evaluated deficiency was first introduced in the protester's revised proposal following discussions.

DECISION

Shivoy, Inc., of Reston, Virginia, a small business, protests the award of a contract to U.S. Information Technologies Corporation (USIT), of Chantilly, Virginia, under request for proposals (RFP) No. SP4701-15-R-0047, which was issued by the Department of Defense, Defense Logistics Agency (DLA), for database support services and maintenance. Shivoy challenges DLA's evaluation of its proposal as technically unacceptable and ineligible for award. The protester contends that the agency's evaluation was materially flawed due to a latent ambiguity, introduced by the agency during discussions. Shivoy also asserts that DLA's discussions were misleading.

We deny the protest.

BACKGROUND

On June 4, 2015, DLA issued the RFP seeking Oracle database and application server system support and maintenance. The solicitation anticipated the award of a fixed-price contract, with a 1-year base period of performance and two 1-year options. RFP at 36; Performance Work Statement (PWS) at 21.

The solicitation provided for award on a lowest-priced, technically-acceptable basis, considering three non-price factors: (1) technical approach, (2) key personnel, and (3) past performance. RFP, attach. 3, at 2-3. The RFP stated that, “[i]n order to be considered awardable, [proposals] must be ‘acceptable’ . . . in every non-price factor.” Id. at 1.

As relevant here, under the key personnel factor, the RFP stated that an offeror’s proposed key personnel “will be evaluated to determine whether the individuals possess the requisite qualifications and experience referenced in the PWS [performance work statement].” Id. at 2. Specifically, the solicitation stated that the key personnel proposed shall, “at a minimum, clearly demonstrate that the personnel possess the minimum skills as stated in Section 2.5.2 of the PWS and provide reasonable assurance of continued personnel availability during the performance period.” Id.

Section 2.5.2 of the PWS identified three positions as key: (1) Project Manager/Lead Oracle Database Administrator (DBA), (2) Senior Oracle DBA, and (3) Mid-level Oracle DBA. PWS at 16-18. For each position, the PWS listed minimum security clearance and information assurance certification requirements. Id. As relevant here, the PWS stated that the three key personnel must possess the following certifications “at the time of award”: (1) either Oracle Certified Professional 11g or Oracle Certified Master, and (2) Security+ Continuing Education. Id. at 17-18.

The solicitation did not require offerors to provide copies of the certifications with their proposals. Rather, the solicitation required that offerors “submit resumes for those persons identified as Key Personnel” and stated that the “[r]esumes submitted must state how the vendor’s personnel experience and capabilities meet the Key Personnel requirements set forth in the PWS.” RFP, attach. 2, at 4. The solicitation did not require that offerors identify non-key personnel in their proposals. Id.

DLA received proposals from eight offerors, including Shivoy and USIT. Agency Report (AR) at 4. USIT is the incumbent contractor for the requirement. RFP, amend. 0001, at 2. Shivoy’s initial proposal included resumes for its proposed key personnel. AR, Tab 4, Shivoy Initial Proposal, at 19-24. With regard to non-key personnel, because the RFP did not require that offerors propose non-key personnel prior to award, Shivoy’s initial proposal stated that “[DELETED].” Id. at 14.

After an initial evaluation, the agency conducted discussions with the offerors, advising them of the significant weaknesses and deficiencies identified in their proposals. As relevant here, the agency provided a negotiation letter to Shivoy stating that the protester's proposal "did not document" the certifications and security clearances for Shivoy's proposed key personnel. AR, Tab 12, Shivoy Negotiations Letter (Aug. 13, 2015), at 1. The letter also referenced amendment 0002 to the RFP, which was issued that same day, and which, as relevant here, revised the solicitation to require that non-key personnel possess the same certifications required by the PWS as key personnel. Specifically, amendment 0002 stated:

All Key Personnel and non-Key Personnel that will be performing the requirements of the Performance Work Statement are required to have the following clearance and certifications:

1. IT-I Security clearance requiring a Single Scope Background Investigation (SSBI) or SSBI equivalent with Secret US Access.
2. Oracle Certified Professional (OCP) certification in Oracle version 11gR2 (or higher) or Oracle Certified Master (OCM) certification in Oracle version 11gR2 (or higher).
3. Current CompTIA Security+ (CE) certification.

All offerors are to provide copies of the Oracle Certified Professional (OCP) certification in Oracle version 11gR2 (or higher) or Oracle Certified Master (OCM) certification in Oracle version 11gR2 (or higher) and current CompTIA Security+ (CE) certification for all Key Personnel and non-Key Personnel that will be performing the requirements of the Performance Work Statement.

RFP, amend. 0002, at 2.

In its negotiation letter to Shivoy, the agency requested that the protester "[p]lease review and sign Amendment 0002." AR, Tab 12, Shivoy Negotiation Letter (Aug. 13, 2015), at 1. In addition, the letter stated that "[a]ll requested copies of certifications are to be provided before negotiations close." Id. at 2. Per the letter, final proposal revisions (FPRs) were due by August 17. Id.

DLA received FPRs from six offerors, including Shivoy and USIT.¹ AR, Tab 22, Price Negotiation Memo, at 3. The agency's evaluation of Shivoy's and USIT's FPRs was as follows:

¹ One offeror submitted its revised proposal late, and therefore, the agency did not consider the proposal for award. AR, Tab 22, Price Negotiation Memo, at 3. Another offeror failed to submit a revised proposal. Id.

	Shivoy	USIT
Technical Approach	Acceptable	Acceptable
Key Personnel	Unacceptable	Acceptable
Past Performance	Acceptable	Acceptable
Price	\$3,500,190.14	\$4,226,766.24

AR, Tab 7, Shivoy Initial Tech. Eval., at 2; Tab 8, USIT Initial Tech. Eval., at 2; Tab 22 Price Negotiation Memo, at 46.

Under the Key Personnel factor, the agency found Shivoy’s proposal unacceptable. Specifically, the agency stated that Shivoy’s “revised Volume 2 Technical Proposal did not provide copies of the [certifications] for all non-Key Personnel that will be performing the requirements of the Performance Work Statement as required by Amendment 0002.” AR, Tab 22, Price Negotiation Memo, at 56.

The source selection evaluation board (SSEB) found that only one offeror, the incumbent USIT, met the minimum requirements of the key personnel factor, as revised by amendment 0002. AR, Tab 22, Price Negotiation Memo, at 70. Specifically, that SSEB stated that “[USIT’s] revised Volume 2 Technical Proposal [provided] copies of [the certifications] . . . for all Key Personnel and non-Key Personnel that will be performing the requirements of the [PWS] as required by Amendment 0002.” *Id.* As such, the agency determined that USIT’s proposal was the lowest-priced, technically-acceptable proposal, and awarded the contract to that firm, in the amount of \$4,226,766.24. *Id.* at 76. On August 28, Shivoy received a debriefing. This protest followed.

DISCUSSION

Shivoy contends that DLA unreasonably found its FPR technically unacceptable based on the protester’s failure to provide copies of certifications for all non-key personnel with its FPR. Shivoy argues that the agency’s evaluation was materially flawed due to an ambiguity, introduced by the agency during discussions, regarding whether copies of these certifications were required prior to award. The protester also asserts that DLA’s discussions were misleading because the agency’s negotiations letter to Shivoy led it to believe that DLA was only seeking copies of certifications for key personnel, and not non-key personnel, at the time of FPR submission.² As discussed below, we conclude that any ambiguity regarding the

² Shivoy also raises other arguments. For example, the protester asserts bias on behalf of the agency, and contends that DLA failed to follow its own regulations in issuing amendment 0002 to the RFP. While we do not address in detail all of the arguments raised by Shivoy in its protest, we have reviewed each, and conclude that none of these other protest grounds provides a basis to sustain the protest.

non-personnel certifications requirements was patent, rather than latent. We also find that the agency's discussions were meaningful because the agency identified issues found during its initial evaluation, and then also referred the protester to amendment 0002, which addressed the requirement for non-key personnel certifications, as well as advised the protester that it was required to submit copies of all certifications with its FPR. Accordingly, we deny the protest.

Solicitation Ambiguity

Shivoy contends that neither the amended solicitation, nor DLA's negotiation letter, required that offerors provide certifications for non-key personnel at the time of FPR submission. As discussed above, during discussions, DLA provided Shivoy with a negotiation letter, as well as RFP amendment 0002, which it issued that same day. As relevant here, amendment 0002 stated the following:

All offerors are to provide copies of [the relevant certifications] for all Key Personnel and non-Key Personnel that will be performing the requirements of the Performance Work Statement.

RFP, amend. 0002, at 2.

In addition, DLA's negotiation letter requested that Shivoy, "review and sign Amendment 0002, and stated that "[a]ll requested copies of certifications are to be provided before negotiations close." AR, Tab 12, Shivoy Negotiation Letter (Aug. 13, 2015), at 1-2. The negotiation letter also advised Shivoy that the protester's proposal "did not document" the certifications and security clearances for Shivoy's proposed key personnel. Id.

Shivoy argues that amendment 0002 did not specify when the copies of the certifications were required to be submitted. In this regard, the protester contends that, because the solicitation initially did not require the submission of certifications for key personnel until time of award, it reasonably interpreted amendment 0002 as not requiring the submission of certifications until the time of award. As for the statement in Shivoy's negotiation letter that, "[a]ll requested copies of certifications are to be provided before negotiations close," the protester asserts that, because the deficiencies identified in this letter focused solely on Shivoy's key personnel, Shivoy reasonably interpreted "[a]ll requested copies of certifications" as limited to key personnel. AR, Tab 12, Shivoy Negotiation Letter (Aug. 13, 2015), at 1-2.

The agency disagrees with the protester's interpretation, and contends that amendment 0002, and the statement in the negotiation letter clearly articulated the agency's intent that offerors were to submit copies of all certifications with their FPRs.

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; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2; Fox Dev. Corp., B-287118.2, Aug. 3, 2001, 2001 CPD ¶ 140 at 2. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. DynCorp Int'l LLC, B-289863, B-289863.2, May 13, 2002, 2002 CPD ¶ 83.

We conclude that the agency's interpretation of amendment 0002 is reasonable, and the protester's differing interpretation is not reasonable. As discussed above, the pertinent portion of amendment 0002 stated: "All offerors are to provide copies of [the relevant certifications] for all Key Personnel and non-Key Personnel that will be performing the requirements of the Performance Work Statement." RFP, amend. 0002, at 2 (emphasis added). We think the amendment's statement that "[a]ll offerors" must provide copies of the certifications clearly advised that this requirement was a solicitation requirement, rather than a performance requirement. Id. The amendment did not state, for example, that the requirement applied to "the contractor," "the awardee," or "the successful offeror." Absent an express exception to the unequivocal requirement that all offerors must provide copies of certifications for both key and non-key personnel, there was no reasonable basis for Shivoy to interpret the requirement as applying to post-award performance. See LS3 Inc., B-401948.11, July 21, 2010, 2010 CPD ¶ 168 at 2-3; SNAP, Inc., B-402746, July 16, 2010, 2010 CPD ¶ 165 at 3. Accordingly, we think the RFP clearly advised offerors that submission of the certifications was a mandatory requirement of proposal submission.

To the extent the protester argues that the language in amendment 0002 was unclear concerning when certifications had to be submitted, any ambiguity was patent, i.e., clear or obvious on the face of the RFP, rather than latent, in light of the conflicting statement that "all offerors" must submit copies of certifications. RFP, amend. 0002, at 2. Since any alleged ambiguity regarding these provisions was apparent on the face of the RFP itself, a protest on this ground was required to be filed prior to the submission of FPRs. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

Misleading Discussions

Next, Shivoy argues that DLA's discussions were misleading because the agency's negotiations letter to Shivoy led it to believe that DLA was only seeking copies of certifications for key personnel, and not non-key personnel, at the time of FPR

submission.³ For the reasons discussed below, we find no merit to the protester's argument.

In negotiated procurements, whenever discussions are conducted by an agency, they are required to be meaningful, equitable, and not misleading. Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 19. It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8; Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 at 13. Further, an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

Based on our review of the record, we conclude that the agency's discussions were not misleading. As discussed above, DLA held discussions with all offerors after completing its initial evaluation of proposals. During discussions with Shivoy, DLA advised Shivoy of the deficiencies identified by the agency during its initial evaluation. Specifically, the agency explained that Shivoy's initial proposal failed to document the certifications and security clearances for Shivoy's three proposed key personnel. AR, Tab 12, Shivoy Negotiations Letter (Aug. 13, 2015), at 1. The agency also provided Shivoy with amendment 0002 to the RFP, which as previously discussed, added the requirement that offerors submit copies of certifications for all key and non-key personnel with their FPRs. RFP, amend. 0002, at 2. Although the protester contends that the agency's negotiation letter was misleading regarding whether offerors were required to submit copies of certifications for both key and non-key personnel because the letter highlighted deficiencies in Shivoy's initial proposal regarding only Shivoy's key personnel, we note that the agency did not add the requirement for non-key personnel to the solicitation until it issued amendment 0002--which was after the agency completed its initial evaluation. Id. Accordingly, because the requirement to provide certifications for non-key personnel was to be addressed by offerors for the first time in their revised

³ The protester also contends that the agency's discussions were unequal because they favored the awardee. The record reflects, however, that the agency provided the awardee with the same information regarding amendment 0002, and the agency's request that certifications be submitted with FPRs, as it provided to the protester. AR, Tab 13, USIT Negotiation Letter, at 1-2. Accordingly, we find that this allegation provides no basis to sustain the protest.

proposals, we fail to see how Shivoy could have been misled by the agency's discussions concerning the evaluation of the protester's initial proposal.

Further, as we previously concluded, amendment 0002 clearly articulated that "all offerors" were required to submit copies of the certifications with their FPRs. Thus, to the extent the protester believed its negotiation letter was ambiguous or inconsistent with amendment 0002, any ambiguity was patent, and a protest on this ground was required to be filed prior to the submission of FPRs. 4 C.F.R. § 21.2(a)(1). In sum, based on our review, we find nothing improper regarding the agency's discussions.

The protest is denied.

Susan A. Poling
General Counsel