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Decision

Matter of: LexisNexis

File: B-413612

Date: November 29, 2016

Stephanie Wilson, Esq., and Terrence M. O'Connor, Esq., Berenzweig Leonard, LLP, for the protester.

Julie Cannatti, Esq., and Blythe I. Rodgers, Esq., Department of Housing and Urban Development, for the agency.

Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that an agency's responses to prospective offerors' questions are misleading, inaccurate, and incomplete is denied where the solicitation reasonably describes the work to be performed.

DECISION

Lexis Nexis (Lexis), of Miamisburg, Ohio, challenges the terms of request for proposals (RFP) No. DU100A-16-R-0001, issued by the Department of Housing and Urban Development (HUD) for online legal research (OLR) database services. Lexis contends that the agency's responses to offerors' questions were misleading, inaccurate, and incomplete.

We deny the protest.

BACKGROUND

On July 19, 2016, HUD issued the RFP in accordance with the commercial item procedures of Federal Acquisition Regulation (FAR) part 12. RFP at 149, 151.¹

¹ The agency report included a Bates numbering system, which was numbered as AR000001-AR000233. The citations used in our decision refer only to the last three numbers in the numbering system.

The solicitation contemplated the establishment of a blanket purchase agreement (BPA), under which fixed-price and cost-type task orders would be issued, for a one-year base period and four one-year option periods. Id. at 151-53. The performance work statement (PWS) sought a contractor to provide OLR database and other related services, to include: (1) OLR services; (2) investigative records search services; (3) online court docket services; and (4) associated support services and training. PWS at 158. The PWS outlined the scope of work and specific tasks that the contractor would be required to perform for each service. PWS at 166-175. Additionally, the RFP provided the estimated number of users for each service and required offerors to submit total pricing based on the anticipated quantity of users. RFP at 222. As relevant here, the RFP anticipated 2,410 users for OLR services. Id.

On August 5, prior to the closing time for receipt of initial proposals, the agency responded to questions from offerors. Among other things, the agency was asked whether the RFP was a follow-on requirement and, if so, which firm was currently providing HUD with the four services contemplated by the RFP.² AR, Tab 4, RFP Q&A, 139, 141. The agency informed offerors that the solicitation was a follow-on requirement and identified Lexis as the incumbent contractor, and provided the contract number for the existing contract. Id. at 139. HUD also stated that Lexis was providing OLR services and support services, including investigative records search services, and disclosed the total contract value of \$1,788,578. Id. at 141. The agency also informed offerors that PACER was currently providing HUD with online court docket services under a separate contract, valued at \$75,000. Id. at 142. In response to a question regarding the offices that might require access to the OLR-services BPA and the anticipated number of users of OLR services, the agency reiterated that it anticipated 2,410 OLR users, and notified offerors that at least 10 potential HUD offices could access the services under the solicitation. Id.

After receiving the agency's responses, and prior to closing, Lexis filed an agency-level protest raising its concern that some of the agency's responses were misleading, and that the allegedly incomplete and inaccurate incumbent data could cause vendors to price their proposals too low. Protest, Exh. 3, Lexis Agency Protest, at 3. Specifically, Lexis asserted that the agency should clarify that the estimated users and the number of offices being served under Lexis's incumbent contract (approximately 600 users and one office) was significantly different from the current solicitation's requirements. Id. Lexis also requested that the agency provide the name, contract number, and value of current incumbent contracts being performed in the 10 HUD offices that could be potential buyers under the BPA. Id. at 4. Additionally, Lexis argued that the agency should add a price realism

² The record shows that the communications concerning offerors' questions would be posted on the FedBizOpps website. AR, Tab 4, RFP Questions and Answers (Q&A), at 140.

evaluation to the RFP to protect itself from awarding to an offeror that priced its proposal too low, in reliance on the agency's allegedly inaccurate and incomplete responses. Id. at 1. The agency did not respond to Lexis' agency-level protest prior to the August 12 closing.

By the August 12 closing date, Lexis [deleted] submitted timely proposals. On August 22, Lexis timely protested to our Office.³

DISCUSSION

Lexis contends that the agency's responses to offerors' pre-closing questions were misleading, inaccurate, and incomplete, and therefore do not reflect the agency's actual needs. Protest at 8, 11.

In response, HUD first argues that Lexis is neither an interested party to challenge, nor prejudiced by, the agency's responses regarding the number of estimated users and offices potentially served by the BPA. In this regard, HUD asserts that Lexis is intimately familiar with the scope of its incumbent contract and, therefore, could not either be misled by the responses, or be induced to offer a price that is too low to perform the services required. Legal Memorandum at 4. Thus, the agency asserts that Lexis's protest is based on the economic interests of other offerors, not the protester itself. Id.

Lexis responds that it is an interested party as defined by our Bid Protest Regulations because it is an actual offeror whose economic interests would be affected by the award of the contract to another party. Comments at 4-5. Moreover, Lexis in essence asserts that the defective solicitation renders the competition unfair, because offerors will complete their offers based on differing understandings of the agency's requirements. Comments at 4-5.

³ Our Bid Protest Regulations contain strict rules for the timely submission of protests. Where a protest first has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3). The term "adverse agency action" means any action or inaction on the part of a contracting agency that is prejudicial to the position taken in a protest filed there. 4 C.F.R. § 21.0(e). It is our general view that where, as here, the contracting activity proceeds with opening bids or accepting offers, the protester is on notice that the contracting activity will not undertake the requested corrective action; timeliness is thus measured from this point, rather than from the receipt of a subsequent formal denial of the agency-level protest. Scopus Optical Indus., B-238541, Feb. 23, 1990, 90-1 CPD ¶ 221 at 2-3. Thus, we view Lexis' protest, filed within 10 days of initial adverse agency action, as timely.

In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. Here, we conclude that Lexis is an interested party because it was both a prospective and actual offeror whose economic interest would be affected by the award of the contract.

Next, we address Lexis's contention that the agency's Q&A responses misrepresented the scope and requirements of Lexis's incumbent contract. Specifically, Lexis argues that the agency's responses, by failing to inform offerors that Lexis's incumbent contract serviced only one office and approximately 600 users, would mislead offerors into proposing a price that would be too low to perform the work required. This, in Lexis's view, would put the contract at significant risk. Protest at 10. Additionally, Lexis argues that the agency should add a price realism evaluation to the RFP to protect itself from awarding to an offeror that priced its proposal too low, in reliance on the agency's allegedly inaccurate and incomplete responses.⁴ Id.

The agency counters by asserting that its responses were sufficient, and that the protester has provided no support for its insistence that HUD was required to provide a higher level of detail concerning prior contracts. Legal Memorandum at 9. Additionally, the agency asserts that the solicitation clearly specified the agency's minimum needs and unambiguously provided all offerors with estimates of user access to these services, so that all offerors could determine their unit pricing. Id. at 10.

It is within a contracting agency's discretion to determine its needs and the best method to accommodate them, and we will not question an agency's determination of its needs unless that determination has no reasonable basis. Salient Fed. Solutions, Inc., B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 2. In this regard, specifications must be sufficiently definite and unambiguous to inform bidders of the minimum requirements of contract performance so they may bid intelligently and on a common basis. Sunnybrook, Inc., B-225642, Apr. 10, 1987, 87-1 CPD ¶ 399 at 1; See I.T.S. Corp., B-228919, Nov. 25, 1987, 87-2 CPD ¶ 521 at 3. A protester's

⁴ Lexis also argued that the agency provided incomplete responses to questions regarding incumbent information. Protest at 11. In this regard, the protester asserts that because its incumbent contract only supports one office, and the agency identified at least 10 offices that would utilize the BPA, the agency should have provided information on all contracts held by contractors currently providing similar services to those 10 offices, not just Lexis. Id. These arguments are speculative. Accordingly, this argument is dismissed for failure to state a valid basis of protest. See 4 C.F.R. § 21.5(f).

disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. See Kingdomware Techs., B-407628, Jan. 9, 2013, 2013 CPD ¶ 27 at 3.

Our review of the record provides no basis to question the reasonableness of the agency's responses. The solicitation outlined the agency's actual requirements for the required services and estimated number of users, and advised offerors to price responses based on those estimates. RFP at 222. The protester does not contend that these provisions, which relate to the agency's actual requirements, were misleading, inaccurate, or incomplete. Thus, we fail to see how the mere fact that Lexis holds an incumbent contract performing similar services, albeit for a different number of users and offices, misleads offerors as to the requirements outlined by the RFP. Moreover, the protester has not shown that the level of detail the agency provided rendered the solicitation ambiguous or that its responses were so misleading as to prevent offerors from competing intelligently and on a common basis. In this regard, because we do not view the solicitation, with its Q&As, as misleading, we find unpersuasive the protester's arguments that the RFP should have included a price realism provision. Moreover, where a solicitation contemplates the award of a fixed-price contract, a proposal's price realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. See GlobalOpal, LLC, B-408414.7, B-408414.8, Mar. 19, 2014, 2014 CPD ¶ 140 at 4.

The protest is denied.

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General Counsel