



Decision

Matter of: Government Contracting Services, LLC

File: B-414586.4

Date: June 1, 2018

Kevin Ingley, and Michael A. Johnson, for the protester.
Debra J. Talley, Esq., and Kathleen Kelly, Esq., Department of the Army, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of proposals submitted in response to an earlier, superseded solicitation amendment is dismissed because it is an untimely challenge to the terms of corrective action taken in response to an earlier protest and an untimely request for reconsideration of a prior decision of our Office dismissing the earlier protest based on the agency's proposed corrective action.

DECISION

Government Contracting Services, LLC (GCS), a small business, of Tacoma, Washington, protests the award of a contract to Firelake Construction, Inc., a small business, of Lenexa, Kansas, under request for proposals (RFP) No. W9124P-16-R-A004, issued by the Department of the Army, U.S. Army Materiel Command, for the installation and maintenance of Redstone Arsenal's intrusion detection and video monitoring systems. The protester primarily argues that the agency erred in not properly evaluating proposals and making award based on the proposals submitted in response to RFP, amendment No. 2, as opposed to making award based on the proposals submitted in response to RFP, amendment No. 7.

We dismiss the protest.

BACKGROUND

The RFP, issued on July 26, 2016, and subsequently amended 8 times, specified that award was to be made on a lowest-priced, technically-acceptable (LPTA) basis. RFP at 72.¹ The RFP specified that each primary offeror had to be a DAQ Electronics (DAQ) listed value added retailer (i.e., DAQ certified) in order to be found technically acceptable. Id. On August 8, GCS contacted the agency and requested that it eliminate the requirement that each primary offeror be DAQ certified. Agency Report (AR), Tab 9, GCS Letter to Agency (August 8, 2017), at 1-2. In response, the agency amended the RFP to allow for a primary offeror to satisfy the requirement through one of its subcontractors. RFP, amend. No. 2, at 27.

The Army received proposals from GCS and three other offerors by the submission closing deadline. Combined Contracting Officer's Statement and Agency Legal Memorandum (COSF/Legal Memo.) at 3. The agency subsequently determined that none of the proposals were technically acceptable, and concluded that it needed to revise the solicitation criteria to clarify what certifications each offeror had to possess. Id. at 4-5. The agency therefore amended the RFP to provide that all technicians must be DAQ certified. RFP, amend. No. 3, at 27.

Prior to the closing of the period set for submission of revised proposals, GCS filed a protest, which our Office docketed as B-414586. In its protest, GCS alleged the following: (1) the RFP was unduly restrictive of competition because it required all technicians to possess DAQ certifications; (2) the RFP created a coercive monopoly; (3) the agency improperly revised the RFP to contemplate the award of a cost-type contract; and (4) the agency miscalculated its initial proposal as technically unacceptable.

The GAO attorney assigned to the protest conducted an "outcome prediction" alternative dispute resolution (ADR) conference and informed the parties in a detailed discussion that, in his view, our Office was likely to sustain in part and deny in part the protest. Specifically, he indicated that the requirement for all technicians to be DAQ certified was unduly restrictive of competition where a significant portion of the work would not involve work on DAQ equipment. Additionally, he indicated that GCS' remaining protest allegations were likely to be denied or dismissed for failing to state legally or factually sufficient bases of protest. During the outcome prediction, GCS argued that our Office should recommend that the agency reevaluate and make award based on the proposals submitted in response to RFP, amendment No. 2. The GAO attorney explained that, to the extent the agency elected to take corrective action, the scope and method of such corrective action was a matter generally entrusted to the agency's discretion, and that amendment of the solicitation and requesting revised proposals would be appropriate in light of any change to the agency's requirements.

¹ References herein, unless otherwise specified, are to the RFP as amended.

In response to the ADR, the Army informed our Office that it intended to take corrective action. Notice of Corrective Action (July 12, 2017), at 1. The agency stated that it intended to modify the requirement that all technicians performing work under the contract be DAQ certified. Id. GCS objected to the corrective action on the grounds that it did not address its remaining protest grounds. GCS Response to Agency's Notice of Corrective Action (July 17, 2017) at 1. The protester alleged that the corrective action "does not address the other merits of the protest, to include the broader issue of the improper evaluation process and the resulting prejudice toward GCS." Id. GCS then requested that our Office direct the agency to remove the requirement for DAQ certifications and make award to GCS based on the evaluation criteria used to review initial proposals. Id.

In our July 17 decision, we dismissed the protest as academic based on the agency's intended corrective action. Government Contracting Servs., LLC, B-414586, July 17, 2017 (unpublished decision). Furthermore, we addressed the arguments raised in GCS' objection to the agency's corrective action. Specifically, we found that the protester's objection to the agency's proposed corrective action to amend the solicitation and solicit revised proposals failed to demonstrate that the proposed corrective action was insufficient to render the protest academic. Id. at 1-2. Consistent with the GAO attorney's discussion with the parties during the ADR, we explained that the details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Id. (citing DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3).

GCS filed a request for reconsideration of our dismissal of its protest as academic, which our Office docketed as B-414586.2. GCS sought reconsideration on the basis that the proposed corrective action only addressed its original protest allegations that amendment Nos. 3 and 4 to the RFP were unduly restrictive of competition, but otherwise failed to render academic its other protest allegations, namely that the agency had miscalculated GCS' initial proposal as technically unacceptable. Our Office dismissed the request for reconsideration because it merely repeated GCS' protest allegations and expressed disagreement with our decision, as opposed to demonstrating any material factual or legal errors in our decision. See Government Contracting Servs., LLC, B-414586.2, Sept. 8, 2017 (unpublished decision).

After additional amendments to the RFP, all four of the original offerors submitted proposals in response to RFP, amendment No. 7. COSF/Legal Memo. at 6. The Army then indicated its intent to make award to the LPTA offeror, who was neither GCS nor Firelake. That offeror, however, had concerns over potential ambiguities in the performance work statement (PWS), and the offeror was unwilling to enter into the contract. See id. The agency then issued amendment No. 8 to the RFP to clarify language in the PWS and make other administrative changes to the RFP.

GCS filed a protest with our Office challenging the agency's issuance of amendment No. 8, which our Office docketed as B-414586.3. GCS argued that the amendment was improper because it was not related to the scope of the corrective action that the agency proposed to take in response to GCS' initial protest, and the proposed changes to the RFP were "academic in nature and do not establish sufficient basis upon which to reopen competition after proposals and prices have been submitted and evaluated three times already." AR, Tab 31, GCS Protest (B-414586.3), at 1-2. Among the relief requested, GCS specifically requested that our Office recommend that "Amendment 0008 be rescinded in its entirety and a LPTA award be made in accordance with the terms and conditions of Amendment 0007 based on the proposals that have already been submitted." Id. at 7.

In response to the protest, the Army notified our Office of its intent to take corrective action. Specifically, the agency represented that it would implement the exact corrective action requested by GCS, that is the agency would cancel amendment No. 8 and evaluate and make an award based on the proposals submitted in response to amendment No. 7. AR, Tab 31-1, Corrective Action Notice (Dec. 18, 2017), at 1. Our Office invited the protester to respond to the agency's corrective action notice; the protester declined to respond. Our Office subsequently dismissed the protest as academic based on the agency's proposed corrective action. General Contracting Servs., LLC, B-414586.3, Jan. 2, 2018 (unpublished decision).

Based on the proposals submitted in response to RFP, amendment No. 7, the Army determined that only Firelake and GCS had submitted technically-acceptable proposals. COSF/Legal Memo. at 7. Firelake's proposed price of \$3,199,764.23 was lower than GCS' final proposed price. Id. Therefore, the Army selected Firelake's proposal for award. Id. This protest to our Office followed a debriefing.

DECISION

GCS, in essence, argues that the Army should have: reevaluated the proposals submitted in response to RFP, amendment No. 2; found GCS technically acceptable; and made an award to GCS on the basis of its initial proposal. In this regard, GCS complains that our Office did not thoroughly consider all of its protest allegations during its earlier filed protests. For the reasons that follow, the protest is dismissed.

As an initial matter, GCS complains that our Office did not fully address its original protest allegations from B-414586.1 regarding the agency's alleged failure to reasonably evaluate GCS' initial proposal submitted following amendment No. 2 to the RFP. This contention, however, ignores the fact that this issue was addressed by both the GAO attorney providing the ADR, and by our Office in overruling GCS' objections to the agency's proposed corrective action. As we have previously explained, the protester's complaints regarding the adequacy of the initial evaluation were rendered academic when the agency amended the solicitation to reflect the government's changed requirements, and solicited revised proposals on that basis. Indeed, the Federal Acquisition Regulation (FAR) requires that "[w]hen, either before or after receipt

of proposals, the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation.” FAR § 15.206(a) (emphasis added). This question regarding whether the agency’s initial corrective action was sufficient to render the entirety of GCS’ protest academic has already been resolved in our decision dismissing the initial protest, and in our decision addressing GCS’ subsequent, unsuccessful request for reconsideration. Our Bid Protest Regulations do not contemplate further consideration of these questions.

Furthermore, this protest is essentially an untimely request for reconsideration of our dismissal of GCS’ prior protest, B-414586.3. In response to that protest, the agency announced, consistent with the request for relief in the protest, that it would rescind amendment No. 8, and evaluate and make award based on the proposals submitted in response to amendment No. 7. AR, Tab 31-1, Corrective Action Notice (Dec. 18, 2017), at 1. Our Office dismissed the protest as academic on January 2, 2018, based on the agency’s proposed corrective action. General Contracting Servs., LLC, B-414586.3, Jan. 2, 2018 (unpublished decision). To the extent that GCS objected to our dismissal of its protest based on the agency’s proposed corrective action, it would have needed to file its request for reconsideration within 10 days of our January 2 decision. 4 C.F.R. § 21.14(b). Thus, this new protest, filed more than two months later, is untimely.

Additionally, even if we were to consider GCS’ untimely arguments, they are legally insufficient on their face. Our Office afforded GCS the opportunity to respond to the agency’s request for dismissal based on its proposed corrective action; GCS declined to submit a response. Thus, GCS cannot now raise new challenges to the terms of the stated corrective action that it could have previously raised. In this regard, we have explained that in order to provide a basis for reconsideration, additional information not previously considered must have been unavailable to the requesting party when the initial protest was being considered. Timberline Helicopters, Inc.--Recon., B-414507.2, Aug. 1, 2017, 2017 CPD ¶ 251 at 2. Furthermore, we find no basis to revisit the propriety of corrective action that was specifically requested by the protester. As discussed above, GCS expressly requested that the agency rescind RFP, amendment No. 8, and proceed to evaluate and make award based on the proposals submitted in response to amendment No. 7. AR, Tab 31, GCS Protest (B-414586.3), at 7. To the extent the agency voluntarily acquiesced to the exact corrective action requested by GCS, the protester’s subsequent disappointment at the results of the evaluation does not provide a legally sufficient basis to challenge the agency’s corrective action. C.f. Boston Edison Co. v. United States, 106 Fed. Cl. 330, 336 (2012) (“In light of the fact that the court did precisely what the government and [plaintiff] asked it to do in entering final judgment for [plaintiff], it is extremely difficult for the government now to argue that the court committed ‘a manifest error of law or mistake of fact.’”) (internal quotations omitted).

The protest is dismissed.

Thomas H. Armstrong
General Counsel