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Decision

Matter of: Sygnetics, Inc.

File: B-414649

Date: August 2, 2017

Daniel McAuliffe, Esq., Whitcomb, Selinsky, McAuliffe, PC, for the protester. CPT Matthew Wilson, and Annemarie Drazenovich, Esq., Department of the Army, for the agency.

Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected protester's proposal is denied where protester failed to submit, with its proposal, an end user license agreement, as required by the solicitation.

DECISION

Sygnetics, Inc., of Auburn Hills, Michigan, protests the rejection of the offer it submitted in response to request for proposals (RFP) No. W15QKN-16-R-0003, issued by the Department of the Army, U.S. Army Materiel Command, for recruiting, management, and administrative support services. Sygnetics asserts that the agency unreasonably determined that Sygnetics failed to provide a required licensing agreement with its proposal.

We deny the protest.

BACKGROUND

The solicitation, issued as a small business set-aside, contemplated the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts to provide recruiting, management, and administrative services support. The solicitation provided for award on a best-value basis, considering technical, price, and past performance factors. RFP, § M, at 1.

As relevant to this protest, offerors were required to address a soldier benefits services sample task for which it was necessary to use certain calculators (e.g., a survivor

benefits and a retirement calculator) that would be licensed from a directed source--the Armed Forces Services Corporation (AFSC). RFP, amend. 3, at 2. The solicitation stated that "the Offeror shall submit two copies of their End User License Agreement (EULA) with [AFSC]." Id., amend. 4, § L, at 20. The solicitation also included a table that listed the proposal submission requirements, which for the soldier benefits services sample task specifically listed the requirement for offerors to submit two copies of a EULA with AFSC. Id. amend. 4, at 5, n.4. In addition, the performance work statement (PWS) for the soldier benefits sample task provided that the contractor "shall" license the calculators from AFSC, the cost of which would be reimbursed; the PWS also set forth points of contact for the AFSC. Id., amend. 4, PWS, at 25. The solicitation advised offerors that failure to comply with any requirement of the solicitation could result in the offeror's proposal being rejected as non-compliant. Id., amend. 4, § L, at 7.

Sygnetics submitted an offer by the March 1 closing date for the receipt of proposals. The contracting officer reviewed the proposals received to ensure that all required information was submitted. Request for Dismissal at 4. Sygnetics' proposal was rejected because Sygnetics did not provide the license agreement. Id. Sygnetics protests that decision.

DISCUSSION

Sygnetics protests that the requirement to provide the end user license agreement from AFSC is ambiguous and unjustified, and argues that the agency unreasonably rejected its offer. In this regard, Sygnetics notes that while the solicitation requires the offeror to submit the license agreement, the PWS for the soldier benefits services sample task requires the contractor to license the calculators. Thus, according to Sygnetics, it was not clear from the solicitation whether the offeror was required to provide the license agreement with its proposal, or to license the calculators after contract award.

Sygnetics also notes that the solicitation provided that the cost of the license would be reimbursed as an other direct cost. According to the protester, since the solicitation provides that only allowable services or materials that are specified in individual task orders and approved by the contracting officer can be billed as other direct costs, it was reasonable for the protester to assume that the requirement for an end user license agreement applied to performance of the task order, not to the establishment of the IDIQ contract.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id. Under our Bid Protest Regulations, a patent ambiguity must be protested prior to the time set for receipt of initial proposals, when it is most practicable to take effective action against such defects. 4 C.F.R. § 21.2(a)(1); Cleveland Telecomms. Corp., B-247964.3, July 23, 1992, 92-2 CPD ¶ 47 at 3-5. An offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the

agency proceeds in a way inconsistent with its interpretation. CardioMetrix, B-274585, Nov. 18, 1996, 96-2 CPD ¶ 190 at 3.

Sygnetics' protest that the requirement for a license agreement was ambiguous and not justified is untimely. In this regard, the solicitation required offerors to submit the end user license agreement. See RFP, amend. 4, § L, at 20 ("the Offeror shall submit two copies of their End User License Agreement (EULA) with" AFSC); id. amend. 4, at 5, n.4 (table listing the requirement for offerors to submit two copies of a EULA with AFSC as a proposal submission requirement). To the extent the solicitation also indicated that it was the contractor's responsibility to provide the license agreement, any ambiguity was clear from the solicitation, that is, it was a patent ambiguity. Since Sygnetics did not file its protest challenging the requirement prior to the March 1 closing date for the receipt of proposals, the protest is untimely.

In the absence of a timely challenge to the RFP, we review the agency's evaluation to determine whether it was consistent with the agency's interpretation of the terms of the solicitation. Anders Constr., Inc., B-414261, April 11, 2017, 2017 CPD ¶ 121 at 6. The agency reviewed Sygnetics' proposal to determine if it met the solicitation requirement that each offeror submit two copies of the end user license agreement for the soldier benefits services sample task. Contracting Officer (CO) Declaration at ¶ 3; Agency Rejection of Proposal Letter, April 12, 2017. Since Sygnetics failed to comply with this requirement, the agency reasonably rejected the protester's offer. Solicitation requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is unacceptable and may not form the basis for award.¹ TYBRIN Corp., B-298364.6, B-298364.7, March 13, 2007, 2007 CPD ¶ 51 at 5.

The protest is denied.

Susan A. Poling
General Counsel

¹ Although Sygnetics argues that the agency could only reject its offer if Sygnetics' proposal was found unacceptable under the corporate experience factor, the solicitation specifically advised offerors that failure to comply with any requirement could result in the offeror's proposal being rejected as non-compliant. RFP, amend 4, § L, at 7. Further, the protester argues that if the agency had concerns about Sygnetics' ability to perform, it should have referred the matter to the Small Business Administration (SBA) for a certificate of competency determination. However, the agency concluded that Sygnetics failed to provide the required EULA and was non-compliant with the proposal submission requirements, not that Sygnetics was a non-responsible firm. See Rejection of Proposal Letter, April 12, 2017; CO Declaration at ¶ 3. The agency therefore was not required to refer the matter to the SBA. See AttainX, Inc.; FreeAlliance.com, LLC, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 5.