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Decision

Matter of: Interactive Information Solutions, Inc.

File: B-415126.2; B-415126.3; B-415126.4

Date: March 22, 2018

Christopher R. Shiplett, Esq., Randolph Law, PLLC, for the protester.
Robert J. Symon, Esq. and Lisa A. Markman, Esq., Bradley Arant Boult Cummings LLP, for Unified Business Technologies, Inc., the intervenor.
Jonathan A. Hardage, Esq., Department of the Army, for the agency.
Robert T. Wu, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the awardee had an unfair competitive advantage because of its employment of a former high-level government employee is denied where the record does not support the allegation.
 2. Protest that the agency unreasonably evaluated the awardee's proposal as technically acceptable is denied where the evaluation was reasonable, in accordance with the stated evaluation criteria, and the solicitation was not latently ambiguous.
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DECISION

Interactive Information Solutions, Inc. (IISI), of Springfield, Virginia, protests the award of a contract to Unified Business Technologies, Inc. (UBT), of Troy, Michigan, by the Department of the Army, Army Contracting Command - Aberdeen Proving Grounds, under request for proposals (RFP) No. W91CRB-17-R-0005 for web and programming support services. IISI argues that UBT had an organizational conflict of interest, challenges the agency's determination that UBT's proposal was acceptable under the stated evaluation scheme, and contends that the solicitation contains a latent ambiguity.

We deny the protest.

BACKGROUND

The RFP, issued on March 13, 2017, sought proposals from small businesses to provide web and programming support services for the U.S. Army Security Assistance

Command (USASAC). Agency Report (AR), Tab 7, RFP, at 1-12. USASAC, a subordinate command of the U.S. Army Materiel Command, administers the Army's Foreign Military Sales (FMS) initiative and serves as the executive agency for the Army Security Assistance Program. Id. at 12-13. The stated goal of the requirement was to construct and maintain uninterrupted business intelligence capabilities for USASAC and its customers. Id. at 14. In support of this objective, the awardee was to provide various services including direct analytical planning, programming, system administration, design, and technical support in the areas of web development, e-commerce, business intelligence and social media. Id.

Proposals were to be evaluated on a lowest-price, technically acceptable (LPTA) basis, considering technical, past performance and price. Id. at 40. Proposals were to be evaluated on an acceptable/unacceptable basis for each non-price (technical and past performance) factor. The technical factor included three subfactors: technical capability, staffing, and corporate experience. Id. Under the technical factor, proposals received an acceptable rating if "evaluation of factors indicates that the offeror's proposal clearly meets the stated criteria in the [RFP]." Id. at 41. The RFP defined the approach to technical evaluation as, "[a]n Offeror's technical proposal will be subject to evaluation by a team of Government personnel. Proposals will be evaluated to determine whether the Offeror's methods and approach have adequately considered, defined, and satisfied the requirements specified in the solicitation requirements." Id.

Under the corporate experience subfactor, offerors were required to demonstrate how they meet or exceed listed experience requirements as an entity. Id. at 38. Consistent with the terms of the RFP, experience could not be shown through individual employees performing on the contract, but only through the firm's own experience or that of major subcontractors. Id. Offerors were required to demonstrate experience in each of the following areas: Army FMS mission, support, and business processes; USASAC's automation applications, current tools, database platforms and internet support; and development and maintenance of new web applications using Microsoft SharePoint technologies for various sites. Id.

Four proposals were received by the agency, including those from IISI and UBT. AR, Tab 18, Price Negotiation Memorandum (PNM), at 6. After conducting discussions and evaluating final proposal revisions, both IISI and UBT were found to be technically acceptable for all non-price factors. Id. at 6-11. UBT proposed a total price of \$6,601,452, whereas IISI submitted a price of \$8,307,898. Id. at 12. Based on the results of the evaluation, the agency decided to award a contract to UBT. This protest followed.

DISCUSSION

The protester argues that the award to UBT was improper because UBT had an unmitigable organizational conflict of interest (OCI). Specifically, the protester argues that "the awardee's conflict is based on both biased ground rules and unequal access to information." Protest at 9. IISI also contends that the agency unreasonably found

UBT's proposal to be technically acceptable because "IISI is the only vendor that has supported some of [the systems detailed in the solicitation] since their inception at USASAC. Therefore, UBT does not have that experience and cannot demonstrate that subject matter expertise." Id. at 13-14. Finally, in response to the agency report, IISI asserted a supplemental ground of protest arguing that the solicitation contains a latent ambiguity. Second Supp. Protest at 10.

Timeliness

As a preliminary matter, we address the timeliness of one of the supplemental protest allegations. On January 12, the agency submitted a request for dismissal accompanied by a determination and finding document from the contracting officer, which concluded that she found no organizational conflict of interest that would make UBT ineligible for award. Determination and Finding (D&F), at 1-3. In response, IISI filed its first supplemental protest arguing that the D&F was meaningless, unreasonable and unsupported by the record because the contracting officer failed to consider that a former high-level government employee who was later employed by UBT had access to competitively sensitive information as an employee of a contractor to USASAC after he had left government service.¹ Supp. Protest at 5-7. In support of its argument, the protester submitted a website screenshot of an article discussing the former chief of staff's departure from USASAC to work for a contractor, and various emails from 2016 discussing that contractor's work on a USASAC contract. Id. at exhibits 1-5.

On January 23, the government submitted a request for dismissal arguing that the protest ground was untimely and represented piecemeal presentation of issues not permitted by our Office's timeliness rules. Request for Dismissal at 4. We agree. Our Bid Protest Regulations require that protests other than those based on alleged solicitation improprieties shall be filed not later than 10 days after the basis of protest was known, or should have been known. 4 C.F.R. § 21.2(a)(2). The regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions proving alternative or more specific legal arguments missing from earlier general allegations of impropriety. CapRock Government Solutions, Inc. et al., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 24. Our Office will dismiss a protester's piecemeal presentation of arguments that could have been raised earlier in the protest process. Alfa Consult S.A., B-298164.2, B-298288, Aug. 3, 2006, 2006 CPD ¶ 127 at 3, n.2.

While the protester argues that this protest ground is timely because it is based on the protester's assertion that the contracting officer failed to reasonably consider information in its D&F, the gravamen of the allegation is that the former chief of staff had unequal access to information as a contractor to USASAC after leaving government

¹ The former high-level government employee served as the chief of staff for USASAC, and was later employed by UBT. This individual is the focus of IISI's OCI and unfair competitive advantage allegations discussed in more detail below.

service. The protester relies only on public information to support its argument, and on emails that are more than a year old. On this record, we can only conclude that the protester could have brought the protest allegation at the time the firm submitted its original protest. As such, we dismiss the allegation as untimely filed. MILVETS Sys. Tech., Inc., B-411721.2, B-411721.3, Jan. 14, 2016, 2016 CPD ¶ 42 at 7-8 (dismissing supplemental protest as piecemeal presentation, where protester did not diligently pursue information providing basis for protest).

Organizational Conflict of Interest and Unfair Competitive Advantage

IISI argues that the award to UBT was improper because UBT had an unequal access to information OCI. Protest at 9. As discussed, the protester focuses its arguments on UBT's employee who had previously served as chief of staff for USASAC, arguing that the individual would have had access to non-public information that would cause UBT to have an OCI. The protester also argues that since this individual was "involved in the creation of strategic [information technology (IT)] acquisition planning, and the creation of IT requirements generally and the specific requirements of this solicitation . . . [the individual's] employment with UBT causes UBT to have a 'biased ground rules' OCI as well." Protest at 11.

The Federal Acquisition Regulation (FAR) instructs agencies to identify potential OCIs as early as possible in the procurement process, and to avoid, neutralize, or mitigate significant conflicts before contract award so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, 9.505; PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. Subpart 9.5 of the FAR, and decisions of our office, broadly categorize OCIs into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR §§ 9.505(b), 9.505-4; Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶ 150 at 6. A biased ground rules OCI may arise where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing or providing input into the specifications or statement of work. FAR §§ 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. Operational Resource Consultants, Inc., B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38 at 6.

A review of the record shows that IISI has failed to allege cognizable grounds of protest under FAR subpart 9.5. As stated above, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract. Here, however, IISI is not alleging that UBT had access to nonpublic information as part of its performance on a government contract, but instead through the hiring of a former high-level government employee. A biased ground rules

OCI may arise where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract. Again, here, the factual scenario alleged--the hiring of a former high-level government employee--does not implicate the scenario or concern of a biased ground rules OCI.

However, while the factual basis alleged by IISI does not implicate or otherwise support either biased ground rules or unequal access to non-public information OCIs, IISI did sufficiently proffer facts supporting a possible unfair competitive advantage by the awardee's hiring of USASAC's former chief of staff. Additionally, while the protester mostly discusses the circumstances alleged through the lens of an unequal access to information OCI under FAR subpart 9.5, the firm does discuss our decisions applicable to possible unfair competitive advantages resulting from the hiring of former government officials. Protest at 10 (discussing our decision in OK Produce; Coast Citrus Distributors, B-299058, B-299058.2, Feb. 2, 2007, 2007 CPD ¶ 31 at 9, and the relevant case law contained therein). As our Office has explained in numerous decisions, challenges based on an offeror's hiring or association with former government employees who have access to non-public, competitively useful information are more accurately categorized as unfair competitive advantages under FAR subpart 3.1 rather than OCIs under FAR subpart 9.5. See e.g. Northrop Grumman Systems Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 6-8; Threat Management Group, B-407766.6, July 3, 2013, 2013 CPD ¶ 167. Consequently, we read this protest to proffer an allegation of unfair competitive advantage, which we discuss next.²

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR § 3.101-1; Guardian Techs. Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 5. In this regard, where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based on the appearance of impropriety which is created by this situation, that is, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not mere innuendo or suspicion. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 29. Thus, a person's familiarity with the type of work required resulting from the person's prior position in the government is not, by itself, evidence of an unfair competitive advantage. Rather, there must be "hard facts" establishing the person's access to non-public information, which could provide a firm with an unfair competitive advantage. Id.

² The standard for evaluating whether a firm has an unfair competitive advantage under FAR subpart 3.1 stemming from its hiring of a former government employee is virtually indistinguishable from the standard for evaluating whether a firm has an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest under FAR subpart 9.5. Northrop Grumman, supra, at 6.

To resolve an allegation of an unfair competitive advantage under these circumstances, we typically consider all relevant information, including whether the former government employee had access to competitively useful inside information, as well as whether the former government employee's activities with the firm were likely to have resulted in a disclosure of such information. Physician Corp. of Am., B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198 at 4-5. Whether the appearance of impropriety based on an alleged unfair competitive advantage exists depends on the circumstances in each case, and, the responsibility for determining whether to continue to allow an offeror to compete in the face of such an alleged impropriety is a matter for the contracting agency, which will not be disturbed unless it is shown to be unreasonable. Health Net Fed. Servs., LLC, supra.

Here, IISI alleges that the former chief of staff served as the senior rater of the chief information officer (CIO), who was responsible for this and prior procurements within his directorate. Protest at 11. The protester alleges that the chief of staff received reports from the CIO regarding "the entirety of the web development and software work being performed within USASAC, and all of USASAC's plans for future web development and software work, including the requirements of the solicitation at issue here." Id. at 12. IISI alleges that the chief of staff "was involved in every aspect of the planning and execution of web development and software work, and of the planning for this solicitation." Id. Further, that the individual would have been aware of prior acquisitions, as well as IISI's proprietary information. Id.

The agency counters with a declaration from the former chief of staff, where the individual asserts that the CIO and contracting officer's representative were responsible for all contract actions, and that he never signed or reviewed any information technology contract actions for USASAC. Declaration of Chief of Staff at 1. With respect to this procurement, the individual affirms that he "had no previous knowledge, nor did [he] receive any [proprietary] information or source selection information concerning this USASAC Web and Program Service solicitation either while on active duty or after [his] retirement from government service." Id. at 2. The former chief of staff also declares that he "did not have access to, or involvement with, either competition sensitive information related specifically to this procurement or to IISI." Id. Additionally, the contracting officer, after investigating this matter, made the following determination, "I have found no evidence that [the individual] had any involvement in the development of the solicitation PWS [performance work statement], or that he had access to or received any proprietary or source selection information relating to the Web and Program Services Support solicitation, or that he had any influence on the source selection decision." D&F at 3. Furthermore, based on her findings the contracting officer concluded that "UBT did not and does not have an organizational or other conflict of interest that would make it ineligible for award." Id.

On this record, we have no basis to question the reasonableness of the contracting officer's determination that no unfair competitive advantage, or even appearance of an unfair competitive advantage exists. Health Net Fed. Servs., LLC, supra. In this regard, the facts do not establish that the former chief of staff had access to any non-public,

competitively useful information related to this procurement. The former government employee affirmed as such, and the contracting officer's investigation did not reveal any evidence supporting the protester's allegation. Absent any hard facts supporting the protester's allegation of impropriety, or appearance of an impropriety, we are provided no basis to sustain the protest ground alleged. Id.

Technical Evaluation

IISI challenges the agency's evaluation of MBT's proposal, arguing that it was unreasonable to find the awardee's proposal to be technically acceptable. In this regard, the protester argues that USASAC supports a "very niched area" of FMS for the Department of Defense, and uses systems that only operate within this very segmented area. Protest at 14. The protester asserts that the solicitation made the ability to demonstrate subject matter expertise with those systems a mandatory component of an acceptable proposal, and IISI is the only vendor that has supported some of these systems since their inception at USASAC. Id. As such, IISI contends that UBT does not have the experience and cannot demonstrate the subject matter expertise to be found acceptable. Id.

The agency responds that under the terms of the solicitation, offerors were not required to demonstrate prior experience with each listed system to satisfy the requirements of the technical capability subfactor. Memorandum of Law (MOL) at 22. Instead, offerors were only required to delineate the organizational and management approaches and management tools and systems intended for the performance of the contract. Id. The agency also asserts, in any event, that in addition to providing a management approach, UBT demonstrated its understanding of the systems set forth in the solicitation. Id. Based on this, the agency concludes that the evaluation under this subfactor was reasonable and IISI's arguments represent nothing more than disagreement with the evaluator's conclusions. Id. at 22-23. We are provided no basis to question the agency's evaluation in this regard.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶ 263 at 2. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Id. We will not sustain a protest where the agency's evaluation is reasonable, and the protester's challenges amount to disagreement with the agency's considered technical judgments regarding the specific elements of an offeror's proposal. BNL, Inc., B-409450, B-409450.3, May 1, 2014, 2014 CPD ¶ 138 at 5.

Here, IISI's disagreement with the agency's evaluation appears to stem from its belief that the solicitation required acceptable offerors to provide details as to their technical approach for various elements found in the PWS. As an example, the protester argues that subsections (d) and (e) of PWS section 5.3 "ask for a description of how an offeror

will provide access through AKO, DKO, or DISA versions of SSO”³ yet none of these acronyms are found in UBT’s proposal. Protester’s Comments at 7. Section 5.3 of the PWS, subsections (d) and (e) require the contractor to “[p]rovide access through AKO/DKO/DISA SSO or meet the current Army requirements for access into” the USASAC and tri-service portals and enterprise systems. RFP at 29. Neither of these subsections of PWS section 5.3 ask for a description of how an offeror will provide access to the relevant systems, as the protester alleges. They are, each, one of numerous tasks to be performed by the awardee of the subject contract. Id.

With respect to whether the evaluation criteria require an offeror to provide a description of how an offeror will provide access to these systems, we conclude that the solicitation is not reasonably read to require the level of detail IISI asserts was required by its terms. In this regard, the RFP states that “[p]roposals will be evaluated to determine whether the [o]fferor’s methods and approach have adequately considered, defined, and satisfied the requirements specified in the solicitation requirements.” Id. at 41. Section L of the RFP required offerors to “delineate the organizational and management approaches and management tools and systems intended for the performance of the contract,” outline their “actual technical approach to fulfill the services referenced in the PWS,” and propose the management approach of automated systems that support USASAC. Id. at 36. Offerors were to “address how their subject matter expertise, when integrated with contractor disciplined processes/approach, will be leveraged to add value to USASAC’s programs.” Id.

Nothing in the RFP’s language would mandate the granular detail that IISI asserts was required. Specific to IISI’s allegation, the solicitation language that offerors were required to outline their actual technical approach to fulfill the services referenced in the PWS, does not require offerors to address every element of PWS section 5.3, but instead propose a technical approach to fulfill those services. Our review of the record, does not lead us to question the evaluators’ determination that UBT’s proposal satisfied the level of detail required by the solicitation to reasonably meet the criteria to be found acceptable under the technical capability subfactor.⁴

We reach a similar conclusion with respect to the agency’s evaluation of proposals under the corporate experience subfactor. Under the corporate experience subfactor, offerors were required to demonstrate how they meet or exceed listed experience

³ Respectively: AKO (Army Knowledge Online), DKO (Defense Knowledge Online), DISA (Defense Information Systems Agency), and SSO (Single Sign-On).

⁴ IISI raises other instances where the protester asserts the agency improperly evaluated UBT’s proposal under the technical factor. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest. In this regard, the other instances raised by IISI suffer from the same infirmity as the example addressed above, that is, the protester’s unreasonable interpretation of the terms of the solicitation.

requirements as an entity. Id. at 38. Offerors were required to demonstrate experience in each of the following areas: Army FMS mission, support, and business processes; USASAC's automation applications, current tools, database platforms and internet support; and development and maintenance of new web applications using Microsoft SharePoint technologies for various sites. Id.

Specifically, section L of the RFP states as follows, in pertinent part:

Experience must be demonstrated in each of the following areas:

- i. Army Foreign Military Sales (FMS) mission, support, and business processes. PWS 1.2, 1.2.6, 13.1, 5.3 b,e,g and u.
- ii. USASAC's automation applications, PWS 1.2; current tools, PWS 1.2.1 and 1.2.4; database platforms, PWS 1.2.3; internet support, PWS 5.3;
- iii. Development and maintain new web applications using Microsoft SharePoint technologies to include but not limited to USASAC training site, Common Operating Picture (COP), Washington Field Office (WFO) site, CASEBOOK, and GFEBS [General Fund Enterprise Business System] FMS site.

RFP at 38.

While the protester argues, in essence, that offerors were required to have experience with every element of the referenced sections of the PWS, a reasonable reading of the RFP does not support such an interpretation. In this regard, offerors were required to propose experience in the three areas listed above. These three areas contain various elements or tasks to be performed under the resulting contract. However, in conveying the requirement that an offeror have experience in each area, the solicitation does not also reasonably convey that offerors were required to have experience in every task listed in each of these areas. Such a reading of the RFP is unduly narrow, and not supported by the language of the RFP. See TransAtlantic Lines, LLC, B-411242, B-411242.2, June 23, 2015, 2015 CPD ¶ 204 at 10 (rejecting narrow interpretation of solicitation language as not supported by the record).

Latent Ambiguity

Finally, IISI argues, in the alternative, that the terms of the solicitation were latently ambiguous, and asks our Office to sustain the protest on this basis. Specifically, as discussed above, the protester argues that it reasonably read the solicitation to require more granular details than required by the agency in its evaluation. The agency responds that "IISI's numerous assertions that the GAO should interpret the Solicitation in such an unreasonably restrictive way that only IISI could meet all of the minimum requirements for technical acceptability . . . are entirely inconsistent with the fact that this Solicitation is a competitive, 100% small business set-aside[,] and [protester's

interpretations] are contrary to the Army's clear intent and applicable GAO precedent." Supp. MOL at 13.

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. Point Blank Enters., Inc., B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 3. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. Desbuild Inc., B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. If the solicitation language is unambiguous, our inquiry ceases. Id. An ambiguity, however, exists where two or more reasonable interpretations of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. If the ambiguity is an obvious, gross, or glaring error in the solicitation then it is a patent ambiguity; a latent ambiguity is more subtle. Id.

Here, our review of the solicitation does not show that the RFP was latently ambiguous. As discussed above, IISI's interpretation of the relevant portions of the RFP was unreasonably narrow, and not supported by the plain language of the RFP. Since the protester's interpretation was not reasonable, there is no ambiguity, latent or otherwise. Moreover, to the extent that IISI reasonably relied on its interpretation of the RFP, the firm has not alleged how it was prejudiced by such an interpretation. In this regard, where a solicitation contains a latent ambiguity, prejudice is measured with respect to the agency's intended meaning of the ambiguous provision. Thus, we examine whether the offeror would have altered its proposal to its competitive advantage if it had the opportunity to respond to the intended meaning. CW Constr. Servs & Materials, Inc., B-279724, July 15, 1998, 98-2 CPD ¶ 20 at 8-9. The reason for this is that in relying on an interpretation not shared by the agency, an offeror is in some way harmed or misled in proposing according to its own interpretation of the solicitation.

Here, IISI has not shown or even alleged that it would have proposed a different technical approach or modified its experience had it known the agency's interpretation of the solicitation. See id. Even if we were to conclude that IISI's interpretation of the RFP was reasonable and the terms were latently ambiguous, which they were not, we find nothing in the record to support a finding that the protester was prejudiced. Marine Terminals Corporation-East, Inc., B-410698.9, Aug. 4, 2016, 2016 CPD ¶ 212 at 10 (denying allegation of latent ambiguity where protester did not show it was prejudiced).

The protest is denied.

Thomas H. Armstrong
General Counsel