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Decision

Matter of: NewSat North America, LLC

File: B-415138

Date: November 21, 2017

Gregory R. Hallmark, Esq., Elizabeth N. Jochum, Esq., Holland & Knight LLP, for the protester.

Wade L. Brown, 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

Protest challenging an alleged defect in a solicitation that became apparent after the solicitation's closing time is dismissed as untimely where the protester did not challenge the alleged defect within 10 days of the defect becoming apparent.

DECISION

NewSat North America, LLC, of Indialantic, Florida, protests the terms of request for proposals (RFP) No. W25G1V-17-R-0003 issued by the Department of the Army, U.S. Army Materiel Command for construction of a Radome equipment shelter.¹ NewSat contends that the Army violated procurement regulations by failing to include in the solicitation language required by Army Federal Acquisition Regulation Supplement (AFARS) section 5132.702(a)(ii)(B), despite funds not being available for the procurement. The agency requests that we dismiss the protest because the protester acknowledges the agency acted reasonably in cancelling the solicitation, and that NewSat knew when the solicitation was issued that funding availability was an issue.

We dismiss the protest.

¹ As described by the agency, a radome is "a dome-like structure designed to protect radar equipment, such as an antenna, from electromagnetic radar or radio signals and from the weather, so that the equipment can be repaired and tested." Memorandum of Law (MOL) at 1-2.

BACKGROUND

The solicitation, issued on December 20, 2016, sought proposals for construction of a radome. Tobyhanna Army Depot (TYAD), the activity procuring the radome, is a working-capital fund activity, and the radome was to be procured as a capital asset under the authority of section 2208(k) of Title 10 of the United States Code (U.S.C.).² Id. The record shows that at the time the solicitation was issued, funding was not yet made available by TYAD's higher headquarters, U.S. Army Materiel Command (AMC), as required by agency procedures. MOL at 3. Specifically, the applicable Army guidance provides, "[w]hen a project is approved by AMC and funds are issued for the [fiscal year], activities should obligate funds by 31 March. A project cannot be funded until it is approved by AMC." AMC Pamphlet 37-1, Economic Analysis of Army Working Capital Fund (AWCF) Capital Investment Program (CIP) Projects, 10 April 2013, paragraph 8(b).

NewSat submitted its proposal to the agency on February 2, 2017. Agency Report (AR), Tab 11, NewSat Proposal, at 1. On March 9, the agency entered into discussions with NewSat, to which the firm provided a written response addressing the agency's concerns on March 20. See generally, AR, Tab 13, Letter Opening Discussions; Tab 14, NewSat Response to Discussions. The record shows, however, that at the time the solicitation was issued, the project had not yet been approved by AMC, and thus funds were not available for the procurement in accordance with AMC Pamphlet 37-1. AR, Tab 8, Email among TYAD Engineers; MOL at 2-4. The record also indicates that NewSat was aware of the funding issues as early as May 18, when a representative of the firm communicated with an agency official inquiring about the status of funding for the radomes. AR, Tab 17, Emails between TYAD and NewSat, at 3-4.

On July 17, after being unable to obtain approval and funding from AMC to proceed with the procurement, the agency cancelled the solicitation. AR, Tab 3, Amendment 0002; MOL at 6. NewSat filed an agency-level protest on July 24 alleging, among other things, that the agency failed to notify industry of the funding issues in accordance with AFARS section 5132.702, and requested that the cancellation of the solicitation be rescinded. AR, Tab 4, Agency-Level Protest, at 2-3. The agency issued a decision denying the protest on August 11. AR, Tab 5, Contracting Officer's Decision.

² Section 2208 permits the Secretary of Defense to establish working-capital funds in the Department of Defense (DoD) to finance inventories of designated supplies and provide working capital for designated industrial and commercial-type activities that provide common services within or among departments and agencies of the DoD. 10 U.S.C. § 2208(a). Additionally, section 2208 permits a working-capital fund to award a "contract for the procurement of a capital asset financed by a working-capital fund ... in advance of the availability of funds in the working-capital fund for the procurement." 10 U.S.C. § 2208(k).

This protest followed.

DISCUSSION

In its protest filed with our Office, NewSat initially challenged the agency's decision to cancel the solicitation and the agency's failure to include, in the solicitation, language required by AFARS section 5132.702. As relevant to this protest, AFARS section 5132.702 permits contracting officers to issue solicitations before the availability of funds under limited circumstances. In issuing a solicitation, however, the contracting officer is required to include the Federal Acquisition Regulation (FAR) clause at section 52.232-18, Availability of Funds, or the following statement: "Funds are not presently available for this acquisition. No contract award will be made until appropriated funds are made available." AFARS § 5132.702(a)(ii)(B).

Upon receipt of the agency report and the agency's explanation of the cancellation of the solicitation, the protester subsequently withdrew its challenge that the agency unreasonably cancelled the solicitation. Comments at 1. Consequently, what remains of NewSat's protest is its allegation that the Army failed to include language in the solicitation required by AFARS section 5132.702.

The Army argues that the primary issue before our Office is the reasonableness of the agency's decision to cancel the solicitation, and since the protester withdrew its challenge to the reasonableness of the agency's decision to cancel the solicitation, the Army requests that we deny the protest in its entirety.³ Agency Response at 1. Moreover, the agency argues that inclusion of the language required by AFARS section 5132.702(a)(ii)(B) was not appropriate because, as a working-capital fund, TYAD does not receive annual appropriations from Congress. MOL at 2. Instead, the agency argues that NewSat was on notice of the lack of availability of funds because it included the following language in the solicitation, "[a]ny resultant Award will be based on availability of funds," and informed NewSat during the course of the procurement that funding was an issue. MOL at 2-4; RFP at 2.

NewSat claims that even if it was proper for the agency to cancel the contract, "it was improper for the Agency to issue the Solicitation in the first place without the mandatory warning that funds were not presently available." Comments to Agency Response at 2. The protester asserts that the issue for decision is whether the agency's "failure to include the mandatory solicitation language was a procurement error that warrants sustaining the protest and recommending reimbursement of the wasted costs of pursuing the contract." Id. As such, NewSat's remaining protest issue focuses on an

³ The agency explains that it was required to cancel the solicitation because it did not receive obligation authority from AMC. Therefore, it could not certify the funds as available for this procurement without potentially violating the Anti-Deficiency Act. Agency Response at 1.

alleged procurement error resulting from the “failure to include the mandatory solicitation language” as discussed above. Id.; see also AFARS § 5132.702(a)(ii)(B).

In this regard, we agree with the agency that NewSat was placed on notice of the lack of availability of funds by the agency during the course of the procurement, but after receipt of proposals. The record establishes that NewSat knew that funds were not available for the procurement no later than May 18, 2017. AR, Tab 17, Emails between TYAD and NewSat, at 3-4. Moreover, since NewSat knew that the solicitation, as issued, did not include the allegedly required AFARS language, and became aware that the procurement was not funded after submitting its proposal in February (but not later than May 18), we conclude that NewSat was on notice by no later than May 18 of the alleged defect in the solicitation of which it complains. See id.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Envtl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3. Where a solicitation defect is not apparent before the solicitation’s closing date, a protest challenging the alleged defect must be filed not later than 10 days after the defect becomes apparent. 4 C.F.R. § 21.2(a)(2); Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7-8.

Here, because NewSat’s allegations regarding the agency’s omission of required language clearly raises a solicitation defect, we find that NewSat’s allegation had to be filed not later than 10 days after the company became aware of the defect. Armorworks Enters., supra. Consequently, since NewSat did not protest within 10 days of when the defect became apparent, and instead waited until July 24 to submit an agency-level protest, its challenge to the terms of the solicitation is untimely. Id.

The protest is dismissed.

Susan A. Poling
General Counsel