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# Decision

**Matter of:** DCR Services & Construction, Inc.

**File:** B-415565.2; B-415565.3

**Date:** February 13, 2018

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David I. Hayden, Esq., and Jackson W. Moore, Jr., Esq., Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, for the protester.

David A. Rose, Esq., The Rose Consulting Law Firm, LLC, for Outside the Box LLC, the intervenor.

Captain Jeremy D. Burkhart, and Brenda S. Quinn, Esq., Department of the Army, for the agency.

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

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## DIGEST

1. Protest alleging that a solicitation amendment created a latent ambiguity is dismissed as untimely where the protest was filed after the next closing time for receipt of proposals and the protester's own arguments show that it was aware of any alleged ambiguity upon receipt of the amendment.
  2. The protester is not an interested party to challenge an award where the record shows that even if the protest were sustained, the protester would not be next in line for award.
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## DECISION

DCR Services & Construction, Inc. (DCR), of Raleigh, North Carolina, protests the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts to six companies under request for proposals (RFP) No. W91247-16-R-0006, issued by the Department of the Army, for a broad range of construction services at Fort Bragg, North Carolina. DCR challenges the agency's evaluation of select awardees' proposals, including an allegation that three awardees cannot meet the RFP's requirements and are ineligible for award. The protester also asserts that the solicitation contained a latent ambiguity that resulted in a disparate evaluation of proposals.

We dismiss the protest.

## BACKGROUND

On January 30, 2017, the Army issued the RFP as a set-aside for historically underutilized business zone (HUBZone) small businesses.<sup>1</sup> Agency Report (AR), Tab 3, RFP at 1. The RFP contemplated the award of no more than six fixed-price, multiple award, indefinite-delivery, indefinite-quantity (MA IDIQ) contracts on a lowest-priced, technically acceptable basis. Id. at 5, 7, 73. The statement of work (SOW) sought a contractor to perform a broad range of maintenance, repair, and minor construction projects at Fort Bragg. Id. at 7. The RFP required offerors to address three evaluation factors: (1) technical capability;<sup>2</sup> (2) past performance; and (3) price. Id. at 62, 64.

The technical capability factor required that an offeror's technical proposal include a written narrative identifying the offeror's response and proposed solution to the seed project and the IDIQ SOW.<sup>3</sup> Id. at 64.

As relevant to price, the initial RFP required that an offeror's proposal include a complete and accurate price for the seed project associated with all contract line item numbers (CLINs). AR, Tab 4, Initial RFP, at 65. The initial RFP also stated that for each CLIN, the offeror shall indicate the CLIN unit price and the resulting CLIN amount. Id.

On April 17, the agency received proposals, including DCR's. Contracting Officer's (CO) Statement at 2. After evaluating proposals, the source selection evaluation board (SSEB), CO, and the contract specialist found all proposals to be unacceptable, and the CO determined to engage in discussions. Id. DCR's initial price was the sixth highest received. AR, Tab 31, Price Negotiation Memorandum, at 2.

On September 14, the CO conducted discussions through evaluation notices and issued Amendment 0006, which, among other changes, revised the requirement for the price factor. RFP at 3, 67. As relevant here, the amendment required offerors to complete the seed project price proposal by "providing a complete line item price breakdown of tasks. The line item breakdown must show inclusion of all MA IDIQ Key Personnel, G&A [general and administrative costs], and profit utilizing the cap rates." Id. at 67. The RFP stated that the MA IDIQ cap rates that were identified for the seed project price proposal, which included proposed labor rates for positions identified as key personnel, G&A, and profit, would be contractually binding and the maximum allowable rates that an awardee could use for future task orders for the entire ordering period. Id. at 67-68, 76.

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<sup>1</sup> The RFP was amended six times. The five amendments issued prior to the receipt of initial proposals are not at issue here and are not discussed in the decision. Unless otherwise noted, all citations herein are to the conformed solicitation.

<sup>2</sup> The technical capability factor initially included four subfactors: (1) MA IDIQ contract management approach; (2) experience; (3) concept for the MA IDIQ contract management approach; and (4) bonding capacity. AR, Tab 4, Initial RFP, at 62-64. Amendment 0006 completely revised subfactors 1 and 3, and deleted subfactor 2. RFP at 62-63.

<sup>3</sup> The seed project was intentionally general in nature and the scope of work was identified as architect-engineer services necessary for the preparation of contract plans and specifications to renovate an existing vehicle maintenance facility. AR, Tab 5, Attach. 1, Seed Project SOW, at 4; Tab 4, Initial RFP, at 62. Our Office added consecutive numbers to the pages of Tab 5.

Additionally, the amendment required offerors to complete two attachments. Id. at 67. The first attachment, an excel worksheet entitled MA IDIQ cap rates, required offerors to provide direct hourly labor rates with fringe benefits for four positions: (1) contract manager; (2) contract superintendent; (3) quality control manager (QC manager); and (3) site safety health officer (SSHO). AR, Tab 16, Amend. 0006, Attach. 6. The second attachment, an excel worksheet entitled seed project pricing, identified as “key positions” the same four positions identified in the MA IDIQ cap rates worksheet. AR, Tab 15, Amend. 0006, Attach. 3.

With regard to price, the RFP stated that award would be based on the total evaluated price for the seed project and that award would be made to the offeror with the lowest price for the seed project. RFP at 76. Additionally, the RFP stated that for purposes of the MA IDIQ contracts, offerors’ pricing must “include the Seed Project with MA IDIQ cap rates for key personnel, G&A, and profit, **no discount applied.**” (emphasis in original) Id.

DCR submitted its revised proposal on September 22.<sup>4</sup> As relevant here, the cover letter of its revised proposal stated:

Per the [government’s] direction, we have installed the Cap Rate pricing into the Seed Project Bid Sheet. Please be advised that this increased the Seed Project [price.] . . . A portion of this increase was generated by having to show/use a QC Manager and SSHO. . . . We understand that the costs may need to be utilized on future Task Orders, which is why they had to be shown as a unit price[, but,] in turn, this forced us to raise our Seed Project price.

AR, Tab 21, DCR Revised Proposal, Sept. 22, 2017, at 1.

After evaluating final proposals, the agency determined that DCR’s proposal was technically acceptable, and the highest priced of the 11 acceptable proposals.<sup>5</sup> AR, Tab 32, Source Selection Decision (SSD), at 7-8. On October 1, the agency notified DCR that its proposal was not among the six lowest-priced proposals that were selected for award. AR, Tab 33, Notice of Award, at 1-2. After requesting and receiving a debriefing, and filing an agency-level protest, which was later dismissed, DCR protested to our Office.

## DISCUSSION

DCR challenges the agency’s evaluation of proposals, and contends that the solicitation contained a latent ambiguity. We have reviewed all of the protester’s various arguments and conclude that none furnishes a basis to sustain the protest.

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<sup>4</sup> Although Amendment 0006 states that the date for submission of revised proposals was September 21 at 2:00 p.m. Eastern Time, the CO statement indicates that revised proposals were due on September 22 at 3:00 p.m. Eastern Time. See RFP at 3; COS at 2.

<sup>5</sup> On September 27, the agency engaged in a second round of discussions with DCR regarding its technical proposal. AR, Tab 22, Second Round Discussions, at 1. The evaluation notice invited DCR to revise price and technical proposals. Id. DCR revised only its technical proposal. AR, Tab 23, DCR Final Technical Proposal, at 1.

## Untimely Issues

DCR contends that the RFP contained a latent ambiguity. In this regard, the protester contends that it interpreted Amendment 0006, and its associated attachments, to require offerors to include cap rates for a QC manager and an SSHO, and that this interpretation resulted in DCR increasing its seed project price to an amount that was higher than the six lowest-priced proposals. Protest at 11. Additionally, the protester contends that the Army's interpretation of the amendment--that offerors were not required to staff all positions identified in Amendment 0006 and its associated attachments--could not have been discovered until after award. Comments at 10. Notably, DCR also asserts:

Upon receipt of Amendment 6, DCR requested clarification via letter dated 22 September 2017 regarding whether [the agency] required DCR to use the CAP Rates and staffing for all positions identified in the Seed Project and to actually staff the seed project with the named personnel on the bid sheets of Amendment 6. (Exh. 10) DCR received no direct response to this specific inquiry.

Protest at 10.

We conclude that the above challenge is untimely and therefore not for consideration by our Office. Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 5. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to closing time for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1). This rule includes challenges to alleged improprieties that do not exist in the initial solicitation but which are subsequently incorporated into it; in such cases, the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Id.; Draeger, Inc., B-414938, Sept. 21, 2017, 2017 CPD ¶ 308 at 4.

Based on our review of the record, we do not agree that the solicitation contained a latent ambiguity.<sup>6</sup> In this regard, the protester asserts that on September 22, DCR "requested clarification" regarding whether the amendment required offerors to provide staffing for the positions identified in Amendment 0006 and Attachments 3 and 6. See Protest at 10. Thus, by its own arguments, DCR was aware that Amendment 0006 created, at best, a patent ambiguity that should have been protested prior to the closing time for the receipt of proposals. The protester's failure to timely challenge the amended RFP renders this allegation untimely.<sup>7</sup>

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<sup>6</sup> A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Odyssey Sys. Consulting Group, Ltd., B-412519, B-412519.2, Mar. 11, 2016, 2016 CPD ¶ 86 at 5. A patent ambiguity must be protested prior to the next closing time for the submission of proposals in order to be considered timely. Id.; 4 C.F.R. § 21.2(a)(1).

<sup>7</sup> In our view, whether characterized as a request for clarification or specific inquiry, the protester's September 22 letter does not represent a protest. In this regard, our Office has long explained that, to be regarded as a protest, a written statement need not state explicitly that it is or is intended to be a protest, but must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions and a request for relief. Coulson Aviation (USA), Inc., B-411525, B-411525.2, Aug.

## Interested Party

The protester raises other challenges to the agency's evaluation of select awardees. See Protest at 5; Comments and Supp. Protest at 2.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or 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). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Id.

Here, the agency made award to the six lowest-priced, technically acceptable offerors. The protester's proposal was the highest priced of the 11 technically acceptable proposals. Accordingly, one of the four intervening offerors, rather than the protester, would be next in line for award if we sustained any of the protester's remaining challenges.<sup>8</sup> Thus, DCR is not an interested party to protest these issues. Health & Human Servs. Group, B-402139.2, Apr. 8, 2010, 2010 CPD ¶ 205 at 5.

The protest is dismissed.

Thomas H. Armstrong  
General Counsel

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(...continued)

14, 2015, 2015 CPD ¶ 272 at 5-6. A letter that, as here, merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest. Id.

<sup>8</sup> DCR has not challenged the technical or price evaluations of these intervening offerors.