



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: Frequentis Defense Inc.

File: B-416970.2

Date: April 4, 2019

Gregory Ewing, Esq., CKR Law, for the protester.
Lori A. Lange, Esq., and Nick R. Hoogstraten, Esq., Peckar & Abramson, PC, for Harris Corporation, the intervenor.
Alexis J. Bernstein, Esq., Joseph Loman, Esq., Heather M. Mandelkehr, Esq., Department of the Air Force, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency erred in terminating a contract award is denied where the agency reasonably concluded that the protester's proposal did not meet a material requirement of the solicitation.
 2. Protest alleging that a solicitation contained a latent ambiguity is denied where the protester's interpretation of the solicitation language is not reasonable and the alleged ambiguity was apparent from the solicitation.
-

DECISION

Frequentis Defense, Inc., protests the termination of its award and its subsequent exclusion from the competition under request for proposals (RFP) FA4452-18-R-0073, issued by the Department of the Air Force, for command post console systems. The protester alleges that the agency erred in concluding that the protester's proposal failed to meet a material requirement of the solicitation, or, in the alternative, that the solicitation contained a latent ambiguity.

We deny the protest.

BACKGROUND

On September 6, 2018, the agency published the RFP seeking to purchase new command post consoles at fourteen Air Force bases in the United States and Europe.

The RFP provided that a single award would be made on a lowest-priced, technically acceptable basis. Memorandum of Law (MOL) at 1. Among other technical requirements, the solicitation required that the contractor furnish and install new Joint Interoperability Test Command (JITC)¹ certified communications consoles. Agency Report (AR), Tab 8, RFP attach. 6 - Technical Requirements, at 1. In addition to requiring JITC certification for the consoles themselves, the solicitation provided that the proposed command post console systems must be JITC certified. Id. Later in the same section, the solicitation provided other technical requirements for the console system, such as radio integration, uninterruptable power supplies, and a voice recording system. Id. Finally, under the heading “Certification Requirements,” the solicitation provided that all systems must be JITC certified, and be on the Department of Defense (DOD) information network Approved Products List (APL) in accordance with DOD Instruction 8100.04, “DOD Unified Capabilities (UC)” (Dec. 9, 2010), among other things. Id. at 8.

Following the initial publication of the RFP, offerors posed several questions concerning the scope of the JITC certification requirement. See AR, Tab 10, Draft RFP Questions and Answers (Q&A), at 1, 13-14. Specifically, one offeror asked whether the JITC approval “shall include an [assured services session initiation protocol] AS-SIP² connection with [multi-level precedence and preemption] MLPP³ and the radio gateway capability of the [command post] [c]onsole system.” Id. at 1. The agency answered “[y]es AS-SIP is required, included in Attachment 6, Section 2.0 ‘Certification Requirements’, page 8.” Id. Another offeror asked whether the radio interfaces/gateways should be part of the JITC-approved system, and be able to be deployed on the base network close to the radios. Id. The agency responded that “[t]he radios must interface with the [command post console] but not necessarily through the base network, clarified in Attachment 6, Section 1.0 Specification Requirements, page 1.” Id.

Additionally, an offeror asked whether the agency was looking for a system where “all equipment or system installations proposed shall be at the latest [sic] JITC certified for

¹ The Joint Interoperability Test Command tests and certifies products for interoperability with the Department of Defense information network. See AR, Tab 33, Department of Defense Information Network Approved Products List Process Guide, at 7-9. This certification is part of the process by which products may be included on the Approved Products List, which is administered by the Defense Information Systems Agency. Id.

² AS-SIP is a standard DOD signaling protocol, which is based on the session initiation protocol (SIP) commercial standard. See DOD, Department of Defense Assured Services Session Initiation Protocol 2013, Jan. 2013, at 23.

³ MLPP is a feature that, among other things, allows higher-priority voice calls to preempt lower-priority calls in situations where network issues or congestion might prevent all calls from being completed. See AR, Tab 31, DOD Unified Capabilities Requirements 2013, at 271-273.

system and any other associated integrated subsystems.” AR, Tab 10, Draft RFP Questions and Answers, at 13-14. The agency responded “[c]urrently JITC certified and on the APL as described in Attachment 6, page 8.” Id. Similarly, another offeror asked “We assume you are looking for a system where by the systems shall meet interoperability requirements of the JITC to ensure interface with commercial and military interface standards.” Id. To which the agency likewise responded “[c]urrently JITC certified and on the APL as described in Attachment 6, page 8.” Id.

Four offerors responded to the RFP, including the protester and intervenor. MOL at 3. In its technical proposal, the protester repeatedly represented that it was offering a JITC-approved solution or system. See, e.g., AR, Tab 11, Frequentis Proposal at 6, 23. On the basis of those representations, the agency concluded that Frequentis’s proposal was technically acceptable with respect to the JITC certification requirement. MOL at 4. Frequentis’s proposal was the lowest-priced, technically acceptable proposal, and the agency made award to Frequentis on September 28, 2018. Id.

Following the award to Frequentis, two other offerors filed protests of the award, one at the agency-level and one with our Office. Id. Both protesters challenged the JITC certification of Frequentis’s proposed console system. Id. In response to the protests, the agency made inquiries both with Frequentis and with the Defense Information Systems Agency (DISA) concerning the JITC certification of Frequentis’s proposed console solution. MOL at 4-5. During this inquiry, the agency concluded that the local session controller⁴ proposed as part of Frequentis’s console solution was JITC certified and on the APL, but that other parts of Frequentis’s solution had not been individually JITC certified, and Frequentis’s console solution had not been JITC certified as a whole. Id.

In response, the agency indicated that it intended to take corrective action by cancelling the award to Frequentis, performing a new evaluation, and making a new award decision, which rendered the protests academic. See Harris Corporation, B-416970, Oct. 30, 2018 (unpublished decision). Frequentis protested the proposed corrective action at the agency level receiving an adverse decision on December 19, 2018. MOL at 5. This protest followed.

DISCUSSION

The protester principally contends that the agency has misconstrued the JITC certification requirements of the solicitation. Comments at 2-5. Specifically, the protester argues that the JITC certification requirement of the solicitation is limited to only those components which interface directly with the DOD network, while other products which do not interface directly with the DOD network need not be JITC

⁴ A local session controller is a software-based call processing product that provides voice, video, and data services to internet protocol devices, and functions as a traffic manager or controller. Protester’s Response to Request for Additional Briefing at 1.

certified. Id. at 3-5. The protester notes that the agency's reading of the solicitation is unreasonable and inconsistent, and, therefore, that the agency's termination of its award was unreasonable. Id. In the alternative, the protester claims that, even if the agency's reading of the solicitation were reasonable, the solicitation is latently ambiguous, because the relevant language is susceptible of two or more reasonable interpretations and the protester was not aware of the agency's interpretation⁵ until it filed its agency-level protest. Comments at 5-8.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Intelsat General Corporation, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Crew Training Int'l, Inc., B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible; a patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id.

Scope of the JITC Certification Requirement

The protester contends that the purpose of the JITC certification and APL process is to test and certify the interoperability of products with the DOD information network. Comments at 2. Because the purpose of the certification is to establish interoperability with the DOD network, the protester argues, equipment which is "downstream" from the interface with the DOD network--i.e. equipment which does not directly interface with the DOD network, but, rather, interfaces with the DOD network through another piece of equipment--need not be JITC certified. Id. at 3-4. The protester notes that this position is reinforced by the fact that JITC generally only certifies so-called "Unified Capabilities" (UC) products,⁶ and many of the equipment categories to be furnished in this

⁵ The protester additionally argues that it corresponded with an agency official who concurred in the protester's reading of the solicitation, and that the agency has only recently adopted a different reading of the solicitation. Comments at 5. However, our review of the referenced correspondence does not support the protester's argument. For example, in its comments on the agency report, the protester cites to a sentence allegedly quoted from an email in which an agency official appeared to agree with the protester's reading of the solicitation; however, the quoted language does not appear in the email cited by the protester, or in any of the furnished correspondence. Compare Comments at 5 ("After researching for days,' she wrote that she 'still side[d] with [Frequentis's] JITC certified system built around the Cisco LSC.'") with Comments, exh. 4, Email from Technical Evaluator to Protester, Oct. 11, 2018.

⁶ UC products are used for, among other things, the integration of voice, video, and/or data services across a network. AR, Tab 30, DOD Instruction 8100.04, at 26.

(continued...)

procurement, such as console touch screens, are not generally subject to JITC certification and have no corresponding product category on the APL. See Protest at 3; Comments at 2.

Initially, the agency appeared to suggest that the protester's proposed console system did not meet the JITC certification requirement because the system, as a whole, was not JITC certified. See MOL at 8-9; AR, Tab 28, Contracting Officer's Response to Protester's Agency-Level Protest at 2. The protester responded by pointing out that there is no APL product category for command-post console systems, and that there was no existing JITC-approved product (or combinations of JITC-approved products) that could meet all the requirements of the solicitation. Comments at 2. In response to a request from our Office to clarify its position, the agency made clear that it does not read the solicitation to require that all equipment furnished be JITC certified (whether separately, or as a unified system), but rather that any proposed UC components that correspond to product categories on the APL must be JITC certified. Agency Response to Request for Additional Briefing at 2; Declaration of Technical Evaluator at 3-4. That is to say, the agency contends that the solicitation required that any proposed components of a type that JITC certifies, must be JITC certified components drawn from the APL. Declaration of Technical Evaluator at 3-4.

As applied to the protester's proposal, the agency notes that there are two components the protester proposed which exist as product categories on the APL: a local session controller and a radio gateway. Id. at 4-5. However, only the local session controller proposed by the protester was JITC certified and on the APL, the radio gateway⁷ proposed by the protester was not JITC certified or on the APL. Id. Accordingly, the agency concluded that the protester's proposed product failed to meet the JITC certification requirements of the solicitation. Id.; MOL at 8-10.

(...continued)

However, the record also reflects that UC systems which contain non-UC components may be submitted to DISA for testing, and the system as a whole may receive JITC certification. See Intervenor's Response to Request for Additional Briefing at 3. For example, certain network systems incorporating touch screens have received JITC certification, but touch screens as separate components are not generally products which receive JITC certification. Id.; Declaration of Technical Evaluator at 2-3.

⁷ Collaterally, the protester contends that the agency erred in excluding its proposal because the solicitation did not necessarily require offerors to propose a radio gateway, but rather only required "radio integration," which could have been potentially accomplished with a device of a type that is not subject to JITC certification. Protester's Comments on Agency Response to Request for Additional Briefing at 2. The protester's argument is inapplicable to its case, however, because the protester did not propose an alternative method of radio integration; the protester proposed a radio gateway, which is a product category on the APL. See AR, Tab 11, Frequentis Proposal at 15. It is irrelevant that the protester could have hypothetically proposed different components that could have rendered its proposal technically acceptable.

The agency's reading of the solicitation is not unreasonable. The plain language of the solicitation clearly states that the consoles and console system must be JITC certified, and, further, that "all systems" must be JITC certified. AR, Tab 8, RFP attach. 6 - Technical Requirements, at 1, 8. However, it is uncontested that no JITC certified product, or combination of JITC certified products, exists that could address all of the solicitation's technical requirements because of the nature and scope of the JITC certification process. Against that factual background, it is not unreasonable to read the solicitation as requiring JITC certification for all systems that can be JITC certified. Accordingly, we cannot conclude that the agency's reading of the solicitation, and application of that reading to the protester's proposal, is unreasonable.

Ambiguity

In the alternative, the protester contends that, even if the agency's reading of the solicitation is reasonable, the protester's reading of the solicitation, requiring JITC certification only for devices which interface directly with the DOD network, was also a reasonable reading of the solicitation. Comments at 6-8. The protester also argues that it was not aware of any possible ambiguity in the solicitation until after award. Id. In support of this argument, the protester notes that it appears that the Air Force has adopted multiple different readings of the solicitation over the course of the protest, which underscores that the solicitation language is susceptible of multiple readings. Id.; Protester's Comments on Agency Response to Request for Additional Briefing at 2-3.

While we agree that the solicitation in this case may have been ambiguous, we conclude that any such ambiguity was a patent ambiguity. 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). As noted above, the plain language of the solicitation calls for both JITC certified consoles and console systems, and further requires that "all systems" be JITC certified. AR, Tab 8, RFP attach. 6 - Technical Requirements, at 1, 8. However, the fact that no JITC certified product, or combination of JITC certified products, exists which could address all of the solicitation's technical requirements suggests that a plain reading of those solicitation terms would produce an absurd result. Furthermore, several offerors posed questions concerning the scope of the JITC certification requirement, but the agency's responses to those questions did not clarify the scope of the requirement. See AR, Tab 10, Draft RFP Q&A, at 1, 13-14. Rather, the agency's responses merely reinforced that the agency expected the proposed solution to be JITC certified and on the APL.⁸ Id.

⁸ The protester notes that two offerors posed questions that asked whether the radio integration or radio gateway must be JITC certified, but the agency did not state in its responses that the radio integration component must be JITC certified. See Protester's Comments on Agency Response to Request for Additional Briefing at 2 (citing AR, Tab 10, Draft RFP Q&A, at 1). The protester contends that this suggests the solicitation did not, in fact, require that the radio integration component be JITC certified. Id.

(continued...)

To the extent the solicitation requirement was ambiguous, it was patently ambiguous because the unreasonableness of a plain reading of the solicitation was clear on the face of the solicitation. Where, as here, a patent ambiguity is not challenged prior to submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. FFLPro, LLC, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 11. An offeror that competes under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a manner inconsistent with one of the possible interpretations. Shertech Pharmacy Piedmont, LLC, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2.

However, even assuming for the sake of argument that the ambiguity was not a patent ambiguity, the protester's argument fails because the protester's reading of the solicitation language is not reasonable. The Air Force's reading of the solicitation language gives effect to the solicitation's broad language concerning JITC certification to the extent it is possible to do so: in the agency's reading all systems which can be JITC certified, must be JITC certified. See Declaration of Technical Evaluator at 2-3. By contrast, the protester's reading is not rooted in (or reconcilable with) the plain language of the solicitation, but rather seems to be grounded on a selective reading of DOD guidance referenced by the solicitation.

Specifically, the protester notes that the solicitation called for all systems to be JITC certified in accordance with DOD Instruction 8100.04, "DOD Unified Capabilities (UC)," (Dec. 9, 2010), and alleges that the Instruction provides that only UC products connected to the DOD network need be certified. See, e.g., Protester's Comments on Agency Response to Request for Additional Briefing at 1 (citing AR, Tab 20, DOD Instruction 8100.04 at 16 ¶ 4). However, the cited guidance document does not appear to support the protester's position. For example, portions of the guidance other than those cited by the protester unambiguously state that all UC products, which would include local session controllers and radio gateways, need to be tested for interoperability. See AR, Tab 30, DOD Instruction 8100.04 at 16 ¶ 4.a ("All UC products shall be tested and certified for interoperability"). In sum, the protester's contention that, because the radio gateway is not directly connected to the DOD network, it need not be JITC certified, is simply unsupported by the record.⁹

(...continued)

However, the questions referred to were multi-part, compound questions, and the agency's answers simply failed to address the portion of the questions related to the JITC certification of the radio integration component. See AR Tab10 at 1. In this case, the agency's answers were silent on the relevant point, so they cannot be read as modifying the plain language of the solicitation.

⁹ Relatedly, the protester contends that the solicitation requires that systems not directly connected to the DOD information network must comply with the DOD information technology risk management framework, rather than be certified by JITC. Comments
(continued...)

Notwithstanding that there is no basis in the language of the solicitation to make such a distinction, it is unclear why, as a logical matter, the fact that a UC component (such as a radio gateway) is connected to the DOD network through a second UC component (such as a local session controller) necessarily and in all cases eliminates concerns about the interoperability of the first component with the DOD network or with the second component. In this case, the radio gateway must communicate with the local session controller, which ultimately communicates with the DOD network, but the protester's proposed radio gateway is not certified for interoperability with the DOD network, or with the proposed local session controller. See Declaration of Technical Evaluator at 3-4. The fact that the radio gateway may not touch the DOD network directly, as the protester alleges, does not eliminate the possibility that it may, nonetheless, fail to interoperate with the DOD network, or fail to interoperate with the local session controller in such a way that ultimately affects the DOD network. In sum, the protester's reading is unreasonable because it is not supported by the text of the solicitation, and, in any case, is not logically compelling.

The protest is denied.

Thomas H. Armstrong
General Counsel

(...continued)

at 4. However, this reading is unsupported by the text of the solicitation. The relevant solicitation language requires that "all systems" comply with the DOD information technology risk management framework, which is identical to the language used to describe the JITC certification requirement in the same subsection of the solicitation. AR, Tab 8, RFP attach. 6 - Technical Requirements, at 8. Therefore, a plain reading of this provision suggests that it represents an additional requirement, not necessarily complementary one.