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Decision

Matter of: Cashman Dredging & Marine Contracting Company, LLC

File: B-417213.3; B-417213.4

Date: July 19, 2019

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John P. Kassebaum, Esq., Department of the Army, for the agency.

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DIGEST

1. Protest challenging the agency's failure to provide adequate geotechnical data and sufficient time and accommodation to conduct test digs at project site is dismissed where the protester failed to timely challenge improprieties in the solicitation prior to bid opening.

2. Protest challenging an alleged ambiguity with the solicitation's basis for award is denied where the protester's interpretation of the solicitation is unreasonable.

DECISION

Cashman Dredging and Marine Contracting Company, LLC (Cashman), of Quincy, Massachusetts, protests the terms of solicitation No. W912HP18B0004, issued by the Department of the Army, Corps of Engineers (Corps), for dredging services near Charleston, South Carolina. Cashman contends that the solicitation did not provide sufficient geotechnical data, did not allow sufficient time for firms to perform test digs at the dredging site, and that the agency failed to reasonably accommodate Cashman's requests to perform a test dig. Cashman also argues that the solicitation contains an ambiguity with respect to the basis for award.

We dismiss the protest in part and deny it in part.

BACKGROUND

The solicitation was issued on September 6, 2018, as an invitation for bids (IFB), pursuant to the sealed bidding procedures of Federal Acquisition Regulation (FAR)

part 14. Agency Report (AR), Tab 4, IFB, at 1, 16. The IFB contemplated the award of a fixed-price contract for maintenance and new dredging work of approximately 11 million cubic yards of material from the Charleston Lower Harbor Channel and the Wando River in Charleston and Berkeley counties, South Carolina. Id. at 1.

On September 26, a prospective bidder submitted a request for information to the agency, seeking permission to dredge test pits to assess the characteristics of the material to be dredged. AR, Tab 20, Bidder Inquiries, at 6. On September 28, the Corps responded that, consistent with the site inspection clause in the solicitation, it was the contractor's responsibility to ascertain site conditions, but that an independent party may be able to conduct test dredging activities if the appropriate permissions and permits were received. Id.

The Corps received five timely bids by the November 1 bid opening, including a bid from Cashman. Contracting Officer's Statement (COS) at 2. Following a determination that all bids exceeded the independent government estimate (IGE) by more than 25 percent,¹ the agency notified bidders, on November 6, that it was considering cancelling the IFB and completing the acquisition as a negotiated procurement. AR, Tab 8, Letter to Bidders, at 1. The agency's notice requested that bidders identify areas of risk in the solicitation, and ways in which the IFB could be amended to minimize those risks, thereby resulting in potentially lower bid prices. Id. Four of the five bidders, including Cashman, submitted information for the agency's consideration. Protest at 6-7. Cashman, among other things, stated that while it used the agency's provided geotechnical information (i.e., core boring and vibra-core data), such information was not useful for a quantitative analysis of the project. AR Tab 6, Cashman's Response to Agency Nov. 6 Request, at 1. Accordingly, Cashman provided that if the government actively assisted, Cashman could conduct a test dredge to reduce its risk in bidding on the project. Id.

Following multiple revisions to the IGE, the contracting officer determined that all bids still remained unreasonably high. AR, Tab 7, Contracting Officer's Memorandum for Record, at 1-2. Thus, on December 11, in accordance with FAR § 14.404(e)(1), the contracting officer canceled the IFB and converted the acquisition to a negotiated procurement. Id.; AR, Tab 4D, Solicitation, amend. 0004, at 1.

On December 26, Norfolk Dredging Company protested to our Office the agency's decision to cancel the IFB and complete the acquisition as a negotiated procurement. COS at 2. In response to the protest, the agency issued an amendment to the

¹ The Corps is prohibited from awarding a dredging contract where the contract price is more than 25 percent in excess of what the Corps determines to be a fair and reasonable estimated cost. See 33 U.S.C. § 624 ("No works of river and harbor improvement shall be done by private contract . . . [where] the contract price is more than 25 per centum in excess of what [the Chief of Engineers] determines to be a fair and reasonable estimated cost of a well-equipped contractor doing the work.").

solicitation, which, among other things, suspended the due date for proposals indefinitely. AR, Tab 4E, Solicitation, amend. 0005. On March 26, 2019, our Office denied Norfolk's protest, finding reasonable the Corps' decision to convert the IFB to a negotiated procurement. Norfolk Dredging Co., B-417213, B-417213.2, Mar. 26, 2019, 2019 CPD ¶ 127.

On March 19, Cashman requested that the Corps provide sufficient time to allow firms to perform test digs and for the government to facilitate firms' ability to perform those digs. AR, Tab 21, Cashman Request for Test Digs, at 2. On April 1, the agency again amended the solicitation, setting April 17 as the due date for proposals. AR, Tab 4F, Solicitation, amend. 0006. On April 3, the agency responded to Cashman's request by restating the same information it previously provided in its September 28 response to a similar inquiry, and explained that the agency's Charleston District regulatory office could provide details concerning the required permitting. AR, Tab 22, Agency's Response to Cashman, at 1. On April 5, the protester contacted the district regulatory office to inquire about Cashman performing test digs. AR, Tab 23, Email from Cashman to the Corps of Engineers, Apr. 5, 2019 (2:03 p.m.). That same day, Cashman also contacted the contracting officer to request an extension to the proposal deadline, to accommodate Cashman's test digs. AR, Tab 24, Cashman Request for Proposal Deadline Extension, at 1-2. On April 10, the agency declined to grant this extension. AR, Tab 25, Letter to Cashman, Apr. 10, 2019, at 1. By letter dated April 11, the agency informed the protester that an expedited permit to conduct a test dig would take six to eight weeks to process and approve. AR, Tab 26, Email from the Corps of Engineers to Cashman, Apr. 11, 2019 (2:21 pm).

On April 12, prior to the April 17 due date for proposals, Cashman filed this protest with our Office. See AR, Tab 4F, Solicitation, amend. 0006, at 1. The protester alleges that because the solicitation failed to provide sufficient geotechnical data, the agency should have reasonably accommodated, and facilitated, Cashman's request to perform a test dig. Protest at 14-21. Moreover, Cashman argues that the solicitation's basis for award contained a material ambiguity and failed to include evaluation factors. Protest at 11-14.

On April 16, the agency amended the solicitation to extend the proposal submission deadline to April 23. AR, Tab 4G, Solicitation, amend. 0007, at 1. On April 18, the agency issued the eighth amendment to the solicitation, clarifying the basis of award: price would be the only evaluation factor for the procurement. AR, Tab 4H, Solicitation, amend. 0008, at 2. On April 22, Cashman filed a supplemental protest, alleging that this amendment did not resolve the ambiguity concerning the basis for award. Supp. Protest 2-4.

On April 23, Cashman and four other firms submitted a response to the solicitation. COS at 2.

DISCUSSION

Cashman argues that the solicitation fails to provide sufficient geotechnical data or time to conduct test digs, which prevents firms from competing intelligently for award. Protest at 14; Comments at 3. The protester also argues that the solicitation is ambiguous because it contains two different bases for award.² Protest at 11; Comments at 15. As discussed below, we find no basis to sustain Cashman's protest.

Geotechnical Data and Test Digs

The protester contends that the solicitation failed to provide firms with sufficient time to perform test digs, which Cashman argues was necessary to obtain accurate geotechnical data needed to submit an intelligent proposal. Protest at 14; Comments at 3-5. In this regard, Cashman argues that the geotechnical information provided by the agency was insufficient to properly scope the work to be performed. Id. As such, the protester argues that the agency unreasonably declined to extend the proposal submission deadline to allow sufficient time to perform test digs and unreasonably failed to provide Cashman with the necessary assistance to secure permits and permissions to conduct a test dig. Protest at 20-21; Comments at 10-15.

The agency argues that Cashman's protest is an untimely solicitation challenge, which, under our Bid Protest Regulations, was required to be raised before the initial closing time for the submission of bids. Req. for Dismissal at 9-11; 4 C.F.R. § 21.2(a)(1). In this regard, the agency contends that Cashman's bases of protest--concerns over the agency's supplied geotechnical data and whether the solicitation provided sufficient time for test digs--were solicitation improprieties that were evident on the face of the originally released IFB. Req. for Dismissal at 9. As such, Cashman was required to protest these issues prior to the November 1, 2018, bid opening. Id. Moreover, the agency argues that its decision to convert the IFB to a negotiated procurement does not affect the timeliness of Cashman's protest because, consistent with FAR § 14.404-1(f), the Corps is completing this acquisition under a single solicitation.³ Id. at 9-10. Though the Corps issued various amendments to the single solicitation, the agency argues that these amendments did not materially alter the solicitation in a way that would affect Cashman's protest grounds, or otherwise alter the requirement that the protest grounds be raised before bid opening. Id. at 10.

The protester responds that the "full scope of the solicitation's failure to include sufficient geotechnical data" was not immediately apparent to Cashman. Response to

² Cashman withdrew its argument that the solicitation did not set forth evaluation factors. Response to Req. for Dismissal at 1 n.1.

³ Section 14.404-1(f) provides that an agency may, under certain circumstances, cancel an IFB and complete an acquisition as a negotiated procurement, without issuing a new solicitation, provided certain conditions are met. See FAR § 14.404-1(f)(1), (f)(2).

Req. for Dismissal at 5. In this regard, the protester argues that “[w]hile the amount of sample data provided with the RFP was a source of concern for Cashman as it prepared its initial bid, it was not until the Agency opened the bids on November 1, 2018, that the full scope of the problem became apparent.” Protest at 15; Response to Req. for Dismissal at 5. Thus, Cashman argues that it was only upon learning that all bids exceeded the government estimate by varying amounts, that the protester was able to confirm the defects in the solicitation. Id.

Our timeliness 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. As such, our Bid Protest Regulations contain strict rules for the timely submission of protests; they specifically require that a protest based on alleged improprieties in a solicitation that are apparent prior to bid opening or the time set for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). Our Office has previously concluded that where a subsequent amendment to a solicitation does not alter a basis of protest, a protester is required to challenge that solicitation impropriety prior to the time set for receipt of initial proposals. See Aerosage, LLC, B-416381.4, Dec. 21, 2018, 2018 CPD ¶ 432 at 3 n.6.

Here, the protester’s arguments concerning whether the solicitation provided sufficient geotechnical data, and whether the agency provided sufficient time and assistance to Cashman to conduct a test dig, are untimely. In this regard, Cashman does not dispute that the original IFB package included core boring and vibra-core data. Protest at 15. However, the protester claims that while “the amount of sample data provided with the [IFB] was a source of concern for Cashman as it prepared its initial bid, it was not until the Agency opened the bids on November 1, 2018, that the full scope of the problem became apparent.” Id. While it may be that the degree of disparity amongst bid prices was not discoverable until bid opening, the protester fails to provide an explanation as to how this information bears on the sufficiency of the geotechnical data provided in the IFB. Indeed, the adequacy of the agency’s technical data remained the same before and after bid opening. To the extent the agency-supplied data “was a source of concern” for the protester as it prepared its bid, Cashman was required to have raised this protest argument with our Office prior to the November 1, 2018, bid opening. As Cashman did not raise this protest ground until April 12, 2019, we dismiss it as untimely. 4 C.F.R. § 21.2(a)(1).

In addition, Cashman’s allegations regarding the agency’s failure to provide sufficient time and accommodation for Cashman’s test dig, which it alleges were necessary to obtain accurate geotechnical data, are similarly untimely. The protester acknowledges that its protest grounds are challenges to alleged flaws in the solicitation. Response to Req. for Dismissal at 4-5. As discussed above, the alleged lack of geotechnical data and attendant need for test digs was apparent in the initial IFB. Similarly, the amount of time afforded to potential bidders to conduct test digs, and the degree to which the agency would assist in permitting requests, was evident on the face of the IFB. Indeed, the agency responded to the very question of whether a prospective bidder could dig

test sites in its September 28 response to a bidder's question. AR, Tab 20, Bidder Inquiries, at 6. To the extent that Cashman believed the submission date for bids was unreasonably short to accommodate test digs, or that it otherwise disagreed with the agency's failure to accommodate bidders, Cashman was required to raise these arguments before bid opening on November 1, 2018. As Cashman did not raise these protest grounds until April 12, 2019, we dismiss these allegations as untimely. 4 C.F.R. § 21.2(a)(1).

To the extent that Cashman argues that its protest grounds were timely filed because the agency's conversion of the IFB to a negotiated procurement extended the time to protest solicitation improprieties to April 17, 2019, the deadline for proposals, we disagree. An agency may complete an acquisition through negotiation, after the cancellation of an IFB, where all otherwise acceptable bids are unreasonably priced. FAR § 14.404-1(e)(1). The FAR further provides that if an IFB is cancelled because all bids received are at unreasonable prices, an agency may conduct a negotiated procurement without issuing a new solicitation. FAR § 14.404-1(e)(1), (f). Unlike other situations, where the cancellation of an IFB results in the issuance of a new solicitation, the FAR expressly provides that an agency need not issue a new solicitation following a conversion for unreasonable bid prices. Compare FAR § 14.404-1(e)(1) with FAR § 14.404-1(e)(2). Accordingly, here, the agency is completing its acquisition not through the issuance of a new solicitation, but instead, by changing the contracting method, via amendment, under a single solicitation.

In our view, the conversion from an IFB to a negotiated procurement under one solicitation, alone, does not impact the time for filing a protest based upon alleged improprieties in a solicitation. This is true where, as here, the record reflects that the amendments to the solicitation--at or after conversion to a negotiated procurement--issued by the Corps did not materially change the nature or type of work to be completed, nor did they otherwise affect the underlying bases of the protest grounds. In this regard, the type of technical data supplied by the agency, and the site locations to be dredged, have remained unchanged since the issuance of the initial IFB. Given that the solicitation amendments did not affect Cashman's protest bases, we conclude that the agency's conversion from an IFB to a negotiated procurement did not alter the requirement that Cashman raise its geotechnical data and test dig protest grounds prior to the date of bid opening. See 4 C.F.R. § 21.2(a)(1); Aerosage, LLC, supra, at 3 n.6.

Basis for Award

Cashman also alleges that the solicitation is ambiguous because it includes two different bases for award that cannot be reconciled. Protest at 11-12; Supplemental Protest at 2-4; Comments at 15-17. In this regard, the protester argues the solicitation is inconsistent because it provides that award will be made to the firm with the lowest negotiated price, but also provides that award will be made to the firm who represents the best value to the government. Compare AR, Tab 4H, Solicitation, amend. 0008, at 2 ("award is made to the responsible bidder offering the lowest negotiated price") with AR, Tab 4D, Solicitation, amend. 0004, at 5 ("The Government intends to award a

contract . . . to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the solicitation.”). Cashman maintains that these two solicitation provisions are internally contradictory and provide two differing bases for award. Comments at 16.

The agency argues that the solicitation is unambiguous with respect to the basis of award, and that there is nothing incompatible, in this instance, with awarding to a firm with the lowest price and who represents the best value to the agency. Memorandum of Law (MOL) at 5-10. The agency provides that following a conversion from an IFB to a negotiated procurement, the FAR permits agencies to negotiate with firms “in accordance with Part 15, as appropriate” to make a new award decision. FAR § 14.404-1(f); MOL at 6. As such, the agency contends that while the solicitation does contain best value language via the inclusion of FAR clause 52.215-1--a mandatory clause for the procurement at issue--its inclusion “plainly does not mean that this is a standard FAR Part 15 procurement without exception.” MOL at 6.

Where a dispute exists as to a solicitation’s actual requirements, we will first examine the plain language of the solicitation. Sikorsky Aircraft Corp., B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 11. 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.

Consistent with the FAR, an agency may properly cancel an IFB where all bids received are at unreasonable prices, and may complete the acquisition through negotiation. FAR § 14.404-1(c)(6), (e)(1). In these circumstances, an agency may--using part 15 of the FAR, as appropriate--make award without issuing a new solicitation, if the agency affords each responsible bidder with an opportunity to participate in negotiations, provided the agency makes award to the responsible bidder offering the lowest negotiated price. FAR § 14.404-1(f).

In this procurement, the agency advised firms that it was converting from an IFB to a negotiated procurement pursuant to FAR § 14.404-1. AR, Tab 4D, Solicitation, amend. 0004, at 1; AR, Tab 4H, Solicitation, amend. 0008, at 2. The agency, in response to Cashman’s protest, clearly provided, via the eighth amendment to the solicitation, that “price is the only evaluation factor stated for this negotiation, offerors’ proposals will be evaluated in terms of their pricing, and the basis for an award to a responsible bidder will be the lowest negotiated price.” Id. The Corps also informed firms that it would be using FAR part 15 procedures, as appropriate. Id. In this regard, the Corps included FAR clause 52.215-1, which includes language that states that the

agency would make award to the offeror who represents the best value. AR, Tab 4D, Solicitation, amend. 0004, at 5; see FAR § 15.209.

Under these unique circumstances, we agree with the agency that the solicitation was not ambiguous with respect to the basis for award. While we acknowledge that the agency's inclusion of FAR clause 52.215-1 provides language that award would be made to a firm that represents the best value to the government, the protester's interpretation that there are two incompatible bases for award is unreasonable. First, the language of FAR is clear that, when proceeding under FAR § 14.404-1(f), an agency must make award to the "responsible bidder offering the lowest negotiated price." FAR § 14.404-1(f)(2). Second, in response to Cashman's protest, the Corps amended the solicitation to expressly provide that "price is the only evaluation factor" and that the agency would make award to the responsible bidder with the lowest negotiated price. AR, Tab 4H, Solicitation, amend. 0008, at 2. This amendment also provided that the agency would use FAR part 15 procedures, as appropriate. *Id.* While Cashman seemingly argues that the inclusions of the words "best value" converts this procurement into a fully negotiated procurement utilizing all of FAR part 15 provisions and definitions, such an interpretation is inconsistent with the express terms of FAR § 14.404-1 and the language in the eighth amendment to the solicitation. In this instance, when the solicitation is read as a whole, we conclude that the only reasonable interpretation is that the single basis for award is lowest negotiated price. Accordingly, we deny this protest ground.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel