Decision

Matter of: TCG, Inc.

File: B-417610; B-417610.2

Date: September 3, 2019

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DIGEST

1. Protest asserting latent ambiguities in the solicitation is dismissed as untimely where the protester could have raised this protest ground in its initial protest filing, but failed to do so.

2. Protest challenging price reasonableness determination is denied where the agency reasonably documented its conclusion that the awardee's price, while higher than the agency's internal cost estimates, was fair and reasonable.

DECISION

TCG, Inc., a small business located in Washington, DC, protests the issuance of a task order to ValidaTek-CITI, LLC, a small business located in McLean, Virginia, under request for proposals (RFP) No. C-56899, issued by the Defense Information Systems Agency (DISA) for support services for the modernization of the Spectrum XXI (SXXI) system. The protester argues that the agency misevaluated its technical proposal, and failed to evaluate the awardee's price reasonably, resulting in a flawed source selection determination.

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

BACKGROUND

The RFP was issued on November 20, 2018, under the Department of Health and Human Services, National Institutes of Health, Chief Information Officer-Solutions and Partners 3 Small Business (CIO-SP3 SB) governmentwide acquisition contract. The solicitation sought support services for the evolution of the current SXXI technology and software architecture into a modernized SXXI (MSXXI) system. SXXI is a mission-critical national security system used for strategic and tactical operations by the Department of Defense and other federal agencies, along with the North Atlantic Treaty Organization and foreign allies. Agency Report (AR), Tab 4, RFP, at 0061.

The RFP contemplated the issuance of a cost-plus-incentive-fee/fixed-price task order with a 1-year base period and four 1-year option periods. Id. at 0049. The solicitation provided for a best-value tradeoff determination based on three factors: (1) technical/management approach, (2) past performance, and (3) cost/price. Id. at 0051-0055. The technical/management approach factor was more important than the past performance factor, and both factors, when combined, were more important than the cost/price factor. Id. at 0056. Proposals rated unacceptable in any area would be ineligible for award and would be excluded from further consideration. Id. at 0051.

The technical/management factor was to be evaluated using three subfactors, listed in descending order of importance: technical understanding, software development capabilities, and project management. Id. at 0052-0054. To be evaluated as acceptable under the technical understanding subfactor, a proposal had to "demonstrate sufficient understanding of the required efforts," including proposing plans for certain high-level architectures, implementation technologies, and other requirements. Id. at 0052.

To be evaluated as acceptable under the software development capabilities subfactor, the offeror had to meet five standards, including, among other items, "describ[ing] [its] approach for refining all the MSXXI requirements provided in and referenced by the [performance work statement (PWS)] into clear, achievable, verifiable and complete detailed requirements sufficient for coding and testing." Id. at 0053. In addition to describing its refinement approach, each offeror was to provide three examples of requirement refinements based on technical computer science configuration item (CSCI) requirements provided in or referenced by the PWS. Id. The RFP noted that the "method described and examples must, in the judgment of the [g]overnment, demonstrate sufficient understanding of the task and demonstrate the skills to accomplish the task." Id.

TCG submitted a timely proposal in response to the solicitation. Following a round of discussions, DISA evaluated the proposals submitted by TCG and ValidaTek as follows:

	TCG	ValidaTek
Technical/Management Factor		
Technical Understanding	Marginal	Outstanding
Software Development Capabilities	Unacceptable	Good
Project Management	Acceptable	Acceptable
Past Performance	**Satisfactory Confidence**	**Unknown Confidence**
Price/Cost	**$23,673,062**	**$29,946,961**

AR, Tab 25, Price Negotiation Memorandum (PNM), at 3504-3505.

The agency evaluated TCG as marginal under the technical understanding subfactor based on DISA's finding that TCG had not resolved two significant weaknesses within its proposal. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 10. The agency evaluated TCG as unacceptable under the software development capabilities subfactor based on a deficiency assessed due to, in the agency's view, TCG's deficient understanding of the solicitation requirement to provide three examples of the offeror's approach to refining the MSXXI requirements. Id. at 23.

In making its source selection determination, the agency noted that ValidaTek was the only offeror whose proposal was found technically acceptable. See AR, Tab 25, PNM, at 3507. DISA further concluded that ValidaTek had proposed a reasonable price/cost, and that even though ValidaTek's proposal was highest in price/cost, it represented the best overall value to the government. Id. at 3506-3507.

On May 14, 2019, DISA announced the issuance of the task order to ValidaTek. This protest followed.[1]

DISCUSSION

In its initial protest to our Office, TCG challenged the specific concerns cited by the agency in support of its ratings under the first two technical subfactors. See Protest at 5-14. In its agency report, the agency responded to, and substantively addressed, each of these arguments. See COS/MOL at 10-33, 40-41. The protester, however, did not meaningfully address these points in its comments. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does

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[1] This protest is within our jurisdiction to hear protests of task orders placed under civilian agency indefinite-delivery, indefinite-quantity (IDIQ) contracts valued in excess of $10 million. 41 U.S.C. § 4106(f)(1)(B); see also Wyle Labs., Inc., B-413989, Dec. 5, 2016, 2016 CPD ¶ 345 at 4 (the authority under which we exercise our task order jurisdiction is determined by the agency that awarded the underlying IDIQ task order contract, rather than the agency that issues or funds the task order).

not respond to the agency's position or provides a response that merely references, restates, or alludes to the original protest allegations without substantively rebutting the agency's position, we deem the initially raised arguments abandoned. Jacobs Tech., Inc., B-413389, B-413389.2, Oct. 18, 2016, 2016 CPD ¶ 312 at 5-6.

In its response to the agency report, the protester raised several new arguments. With respect to the technical evaluation, the protester contends that the solicitation contained latent ambiguities that resulted in its proposal being unreasonably downgraded under the first two technical subfactors. The protester further contends that the agency applied unstated evaluation criteria in evaluating these subfactors. Additionally, TCG challenges the agency's decision not to engage in a second round of discussions. Last, the protester asserts that in selecting ValidaTek's proposal for award, the agency did not document and conduct a reasonable assessment of ValidaTek's price/cost, which resulted in a flawed source selection determination.[2]

Latent Ambiguity

In its comments on the agency report, TCG asserts that DISA's response to the protest reveals latent ambiguities in the solicitation. While the protester asserts that there are multiple ambiguities in the solicitation, it provides only one example: the requirement under the software development capabilities subfactor to provide three examples of the offeror's approach to "requirement refinement." Comments at 6. In this regard, the solicitation instructed offerors as follows:

> The offeror must describe their approach for refining all the MSXXI requirements provided in and referenced by the PWS into clear, achievable, verifiable and complete detailed requirements sufficient for coding and testing. The offeror must provide three examples of the requirement refinement based on technical CSCI requirements provided in or referenced by the PWS. The method described and example must, in the judgment of the Government, demonstrate sufficient understanding of the task and demonstrate the skills to accomplish the task.

RFP at 0053.

The protester asserts that it reasonably interpreted the term "requirement refinement" to mean "[a]dding detail to the requirements for understanding and reviewing them for completeness and accuracy." Comments at 7. Under this interpretation, TCG contends that it was sufficient for it to refine technical requirements by providing a step-by-step process, so long as these steps/refinements were "based on technical CSCI requirements in or referenced in the PWS," even if each refinement was not itself a requirement stated under the PWS. Id. at 9 (quoting RFP at 0053). Accordingly, for its

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[2] While we do not address in detail every argument raised by the protester, we have reviewed each issue and do not find any basis to sustain the protest.

first example of a requirement refinement, TCG proposed [DELETED]. Id. The protester provided nine refinements of this requirement, which contained a more "granular" outline of TCG's proposed implementation approach. Id.

The agency found that TCG's refinement approach demonstrated a deficient understanding of the task and did not demonstrate the skills to accomplish the task, which increased the risk of unsuccessful contract performance to an unacceptable level. AR, Tab 23, Selection Recommendation Document, at 3467. In particular, the agency faulted the examples provided by the protester for not describing the refinement of requirements "into clear, achievable, verifiable and complete detailed requirements sufficient for coding and testing." Id. (quoting RFP at 0053). For TCG's first refinement example, for instance, the agency noted that TCG had provided "a collection of design ideas, design approaches, statements that are not valid SXXI requirements, and potential SXXI requirements that are not clearly and/or not completely defined." Id. at 3467-3468.

The protester argues that this assessment stemmed from the agency having interpreted the term "requirement refinement" differently than TCG. The protester argues that these differing interpretations evidence a latent ambiguity in the solicitation, which DISA should now clarify before providing offerors an opportunity to submit revised proposals.

The protester, however, failed to raise this argument in its initial protest filing despite receiving a debriefing that explained the agency's rationale for assessing the deficiency in question. See AR, Tab 31, Revised TCG Debriefing, at 4. Because the protester failed to raise these issues at that time, they are untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (requiring protest issues be filed within 10 days after the basis is known or should have been known); Lanmark Tech., Inc., B-410214.3, Mar. 20, 2015, 2015 CPD ¶ 139 at 5 n.2 (piecemeal presentation of protest grounds, raised for the first time in comments, are untimely).[3]

In any event, we are not persuaded that the solicitation language at issue is latently ambiguous. 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

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[3] Similarly, TCG waited until its comments to challenge DISA's decision not to conduct further discussions, see Comments at 14-15, and also waited until its final reply submission to assert that the agency's source selection decision failed to address the "extraordinarily low amount of hours the awardee dedicated to nearly every [cost plus contract line item number (CLIN)]," TCG Reply to Agency Post-Teleconference Submission at 3. As with the protester's latent ambiguity argument, these arguments are untimely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2).

specifications of the solicitation are possible. 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, while a latent ambiguity is more subtle. Id. A solicitation requirement is only considered ambiguous when it is susceptible to two or more reasonable interpretations. Plum Run, B-256869, July 21, 1994, 94-2 CPD ¶ 38 at 4.

Here, while the protester contends that the term "requirement refinement" means merely that the refinements must be "based on" technical CSCI requirements in or referenced in the PWS, TCG's interpretation does not account for the RFP prescription to refine the MSXXI requirements "into clear, achievable, verifiable and complete detailed requirements sufficient for coding and testing." RFP at 0053. Because only the agency's interpretation accounts for the whole of the solicitation language in question, we do not find the language in question to be latently ambiguous.

Best-Value and Price Reasonableness Determination

The protester challenges DISA's best-value determination and the agency's assessment that ValidaTek's overall price was reasonable.[4] In this regard, TCG asserts that the agency's best-value determination was based on "not less than four premises which are either false or not supported by the documentation contained in the [agency report]." Comments at 16. In particular, the protester asserts that ValidaTek's proposed level of effort was far higher than the independent government cost estimate (IGCE) for certain CLINs, that the agency made a computation error in calculating the difference between ValidaTek's price and the IGCE,[5] that the agency failed to document its comparison of ValidaTek's rates to the historic rates paid, and that a comparison to the other offers received cannot justify the reasonableness of ValidaTek's much-higher price. Comments at 16-17.

To the extent these arguments challenge the agency's best-value tradeoff determination, they fail to raise a valid basis of protest because TCG's proposal was found to be technically unacceptable and was therefore ineligible for award. See Learjet, Inc., B-274385, Dec. 6, 1996, 96-2 CPD ¶ 215 at 6. The agency was thus under no obligation to conduct a best-value tradeoff.

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[4] As noted above, each offeror's overall price comprised the sum of both fixed-price and cost-reimbursable CLINs.

[5] This computation error was the result of the agency mistakenly adding a Defense Information Technology Contracting Organization contracting fee in one portion of the PNM, while calculating the difference between ValidaTek's price and the IGCE. We have reviewed this error and are satisfied with the agency's explanation that this error, which accounted for less than two percent of the awardee's price, did not have a material impact on the agency's price reasonableness assessment.

We will, however, consider the protester's argument that the awardee should have been deemed ineligible for award by virtue of the above grounds, which essentially challenge the adequacy of the agency's price reasonableness determination, i.e., DISA's conclusion that ValidaTek's price was reasonable.[6] In this regard, a protester whose proposal is found to be technically unacceptable is an interested party to challenge the eligibility of an awardee, where, as here, the exclusion of the awardee would result in no offerors being eligible for award. See MicroTechnologies, LLC, B-415214, B-415214.2, Nov. 22, 2017, 2018 CPD ¶ 48 at 7 n.10.

A price reasonableness determination is a matter of administrative discretion involving the exercise of business judgment by the contracting officer that our Office will only question where it is shown to be unreasonable. InfoZen, Inc., B-411530, B-411530.2, Aug. 12, 2015, 2015 CPD ¶ 270 at 5. Moreover, the depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion. See Federal Acquisition Servs. Alliant JV, LLC, B-415406.2, B-415406.3, Apr. 11, 2018, 2018 CPD ¶ 139 at 11. In evaluating price reasonableness, the RFP provided that proposals would be evaluated using one or more of the techniques defined in Federal Acquisition Regulation (FAR) section 15.404. RFP at 0055. These techniques include, among other methods, a comparison of the proposed prices received in response to the solicitation (with adequate price competition normally establishing a fair and reasonable price), and comparison of prices to an independent government estimate. FAR §15.404-1(b)(2).

Here, the agency evaluated the reasonableness of ValidaTek's pricing by comparing offerors' overall prices, comparing CLIN pricing to the historical rates for the current SXXI requirement, and comparing overall prices to the IGCE. AR, Tab 25, PNM, at 3507.[7] The contracting officer recognized that ValidaTek's overall price was higher than these benchmarks, but concluded that the price was nonetheless reasonable. See id. We find this conclusion to be reasonable and within the agency's sound discretion.

The protester argues that the agency failed to sufficiently document these analyses, and that DISA's price reasonableness conclusion is both devoid of factual support and inconsistent with the evaluation record. We disagree and find that the record adequately discusses and documents the agency's analysis and conclusion. See AR, Tab 25, PNM, at 3505, 3507. In this respect, the agency's source selection decision

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[6] While TCG challenges the agency's conclusion that ValidaTek proposed "realistic" hours, the protester did not assert that ValidaTek's purportedly high level of effort resulted in an increased technical risk. Instead, TCG's challenge focused on the agency's consideration of ValidaTek's price as reasonable, i.e., not too high, which the protester questions in light of the allegedly overstated hours. See Comments at 16.

[7] In addition, the agency examined ValidaTek's firm fixed prices against its CIO-SP3 SB contract rates, reviewed direct, indirect, and escalation rates, and reviewed its subcontractor pricing. Id. at 3506.

document included a chart that compares the final revised price of each offeror to the IGCE and discusses the price difference between ValidaTek's price and the IGCE. The document ultimately concluded that ValidaTek's higher price was nonetheless reasonable in light of its superior technical approach. See id. at 3505, 3507. While the agency did not document each and every price reasonableness technique it employed, such extra documentation was not needed where, as here, there was adequate price competition and the agency documented its comparison of ValidaTek's price to the IGCE.

TCG additionally challenges the agency's price reasonableness determination in light of an earlier DISA analysis that concluded that many of ValidaTek's proposed hours, under the fixed price CLINs, were significantly higher than the corresponding hours in the IGCE. The protester notes that the agency's earlier analysis concluded that ValidaTek's level of effort "is not acceptable." AR, Tab 20, ValidaTek Cost Realism Analysis, at 3420.

In response to this protest ground, the agency submitted declarations from the contracting officer and a technical evaluator, who explained that the agency later changed its view regarding this issue after reviewing ValidaTek's technical approach, where ValidaTek explained that it had allocated labor in a different manner than the agency had contemplated in creating the IGCE. See Contracting Officer Decl. at ¶¶ 3-4; Tech. Evaluator Decl. at ¶¶ 6-8. For example, ValidaTek allocated management and quality assurance activities to the first task, corresponding to CLIN 0001, rather than spreading these functions across multiple contract tasks as contemplated by the IGCE. See id. The protester challenges this explanation as post-hoc and argues that it is inconsistent with the contemporaneous cost/price analysis undertaken by DISA.

Our Office has stated that post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions where those explanations are credible and consistent with the contemporaneous record. APlus Techs., Inc., B-408551.3, Dec. 23, 2013, 2014 CPD ¶ 12 at 10 n.11. Here, we find the agency's explanation to be consistent with, and to fill in details missing from, the contemporaneous record. In this respect, the declarations submitted by the agency explain that the agency initially concluded that ValidaTek's proposed hours were unacceptably high relative to the IGCE, but that the agency revised this view after assessing those hours in light of ValidaTek's technical approach. This explanation is consistent with the agency's later-created evaluation and source selection documents, which did not note any issues with ValidaTek's hours and furthermore concluded that the awardee's price was fair and reasonable. See AR, Tab 23, Selection Recommendation Decision, at 3494-3495; AR, Tab 25, PNM, at 3506-3507.

In light of these conclusions, and the agency's reasonable and sufficiently-documented conclusion that ValidaTek proposed a fair and reasonable price, we see no basis to sustain the protest.

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel