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Decision

Matter of: PREA Auditors of America, LLC

File: B-417856.2

Date: November 26, 2019

Alan Grayson, Esq., for the protester.
William Robinson, Esq., and Monica Barron, Esq., Department of Justice, for the agency.
Lois Hanshaw, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's decision to take corrective action is denied where the agency reasonably concluded that corrective action was necessary to address flaws in the solicitation.

DECISION

PREA Auditors of America, LLC (PREA), a small business of Cypress, Texas, protests the corrective action being taken by the Department of Justice, Federal Bureau of Prisons (BOP), under request for proposals (RFP) No. 15BNAS19RCA0126, for audits of federal correctional institutions. PREA contends that the corrective action was unnecessary and prejudicial to PREA.

We deny the protest.

BACKGROUND

On May 24, 2019, BOP issued a combined synopsis/solicitation for the award of a fixed-price, requirements contract for certification of compliance with the Prison Rape Elimination Act of 2003 standards at federal correctional institutions. Agency Report (AR) Tab 3, RFP at 1.¹ The RFP establishes that the procurement will be conducted using both part 15 of the Federal Acquisition Regulation (FAR) (contracting by negotiation) and FAR part 12 (acquisition of commercial items/services) procedures. Id.

¹ Our Office assigned consecutive numbers to the pages of this document.

at 1, 79. The solicitation contemplated performance for a base year, four 1-year option periods, and a 6-month option to extend services under FAR clause 52.217-8. Id. at 1. Award would be made on a best-value tradeoff basis considering price and non-price evaluation factors.² Id. at 79. The RFP stated that all evaluation factors and subfactors, other than price, when combined, were considered significantly more important than price. Id. at 1. Additionally, as relevant here, the solicitation included FAR clause 52.216-19, Order Limitations, which provided for a minimum order amount of \$7,000. Id. at 7.

By the solicitation's closing date, the agency received proposals from PREA and The Nakamoto Group, Inc. (Nakamoto), the small business incumbent. Contracting Officer's (CO) Statement (COS) at 1. After evaluating proposals, the agency made award to PREA.³ AR, Tab 7, SSD, at 10. After making award, the CO noticed a conflict between the minimum order clause and PREA's proposed price. COS at 2. In response, the CO modified the minimum order from \$7,000 to \$5,995 per audit, to reflect PREA's proposed price. Id. The CO reasoned this change was necessary because the \$7,000 minimum order clause would not obligate PREA to furnish the supplies or services if the BOP placed an order for only one audit. Id. at 2-3.

On August 12, the agency posted the notice of award on FedBizOps.⁴ Id. at 3. On August 15, Nakamoto protested to our Office arguing that the solicitation was misleading because it did not indicate that price would be a deciding factor in award and that the agency unreasonably made award to PREA at a per-audit price under the \$7,000 minimum order threshold.⁵ Protest (B-417856) at 1.

After reviewing Nakamoto's protest, the CO determined, in consultation with the program office, that neither of the minimum order values (\$7,000 or \$5,995) accurately reflected the agency's needs because these values reflect a single audit even though the agency generally conducts more than 20 audits each year. COS at 3. The CO decided that rather than using a set value, it would be more appropriate to describe the

² The RFP incorporated FAR clause 52.212-1, Instructions to Offerors-Commercial Items, which expressly advised offerors of the agency's intent to make award without discussions. RFP at 35.

³ The source selection decision (SSD) indicates that both offerors' proposals were found to be equally rated based on meeting all technical requirements and receiving eight strengths. AR, Tab 7, SSD, at 10. Neither offeror was assessed any deficiencies, weaknesses, or risk. Id. at 5. In making award, the agency concluded that since both offerors had equal technical ratings and satisfactory past performance, price would become more important in selecting the best value to the government. Id. at 10. The agency did not engage in discussions with either offeror. COS at 5.

⁴ The agency did not provide debriefings to offerors. Id. at 3.

⁵ Nakamoto also explained that it developed its cost algorithm based on the order limitation clause. Protest (B-417856) at 1. PREA intervened in that protest.

minimum order in number of audits, and that doing so would impact offerors' proposals. Id.

Accordingly, on August 19, the agency indicated that it would take corrective action by amending the solicitation to change the minimum order from a monetary value to a minimum of 10 required audits per year, reopening discussions, and allowing offerors to submit final proposal revisions. Id. at 4. The agency also added information to the evaluation criteria that explained that: (1) as non-price factors became more equal, price would become more important in selecting the best value; (2) the agency reserved the right to make award to other than the offeror proposing the lowest price when a technically superior proposal warrants payment of a price premium; and (3) the evaluation of proposed price would include the option to extend services under FAR clause 52.217-8. Id.; AR, Tab 10, RFP amend. 1, at 73, 76. We dismissed the protest because BOP's corrective action rendered the protest academic. The Nakamoto Grp. Inc., B-417856, Sept. 5, 2019 (unpublished decision). On August 22, PREA filed this protest with our Office.

DISCUSSION

PREA contends that the agency's corrective action in response to Nakamoto's protest was unreasonable, and the agency's disclosure of its price was improper. PREA asserts that the agency's corrective action was unnecessary and "so insubstantial that it strongly suggests that there is nothing to correct." Protest at 14. While we do not discuss each of the protester's arguments below, we have considered them all and find that none provide a basis to sustain the protest.⁶

The agency asserts that PREA's arguments are incorrect. The agency explains that after award, the agency determined that the solicitation did not accurately reflect its minimum needs because the solicitation identified the requirement for minimum quantities by dollar amount, rather than by the metric the agency concluded was more

⁶ For example, the protester contends that the agency's decision to request revised proposals and reevaluate proposals without discussions violates procurement law. We find no merit to this protest ground. In this regard, the record shows that although the agency stated that it intended to reopen discussions, it did not hold discussions with the parties to discuss any deficiencies, weaknesses, or past performance information. COS at 5. Because the RFP incorporated FAR clause 52.212-1, Instructions to Offerors-Commercial Items, which expressly advised offerors of the agency's intent to make award without discussions, the agency was not required to conduct discussions here. RFP at 35. There are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions, nor is there any requirement for an agency to, for example, document its decision not to engage in discussions. Aviation Training Consulting, LLC, B-417151 et al., Mar. 11, 2019, 2019 CPD ¶ 103 at 6. Additionally, FAR § 15.206 allows an agency to amend a solicitation after the receipt of proposals and FAR § 15.507(b)(2) allows an agency to issue a request for revised proposals in response to a protest.

appropriate--i.e., the number of audits to be conducted. Memorandum of Law (MOL) at 7. The contracting officer further determined that a change in the minimum order from what was effectively one audit to 10 audits could impact the content of proposals. COS at 3. The agency also asserts that upon review of the allegations in the B-417856 protest, it was concerned that the solicitation may have contained an ambiguity. MOL at 9. The agency explains that in that protest, Nakamoto alleged that award to PREA at a price “well under the threshold stated in solicitation” was improper and that Nakamoto relied on the \$7,000 minimum order amount when developing its cost algorithm. Id. at 9 n.8. Therefore, the agency issued an amendment to revise the solicitation to accurately reflect its needs. Id. at 8. The agency further explained that because the amendment could impact the way offerors prepared proposals, and thereby the award determination, it allowed offerors to revise their proposals. Id.

As a general matter, contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. Onésimus Def., LLC, B-411123.3, B-411123.4, July 24, 2015, 2015 CPD ¶ 224 at 3. The details of a corrective action are within the sound discretion and judgment of the contracting agency. Sealift, Inc., B-412041.2, Dec. 30, 2015, 2016 CPD ¶ 9 at 4. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Navarre Corp., B-414962.6, B-414962.7, Oct. 22, 2018, 2019 CPD ¶ 38 at 4. An agency’s discretion generally extends to determining whether it is necessary to amend the solicitation, and reopen the competition. See Strand Hunt Constr., Inc., B-292415, Sept. 9, 2003, 2003 CPD ¶ 167 at 4, 6.

The record provides no basis to object to the BOP’s corrective action. In this regard, the agency concluded that the minimum order clause did not accurately reflect the agency’s needs and presented a potential ambiguity. In order to address these issues, the agency amended the solicitation’s minimum order clause and requested revised proposals.⁷ We find no merit to PREA’s argument that the changes in the amendment were “insubstantial” and caused no material change. See Protest at 11, 14. We have explained that material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. IDEAL Indus., Inc., B-416416, July 26, 2018, 2018 CPD ¶ 253 at 5. In our view, the agency’s corrective action was reasonable because it remedies the issues the agency identified in the procurement.⁸ An agency’s corrective action is reasonable if it is appropriate to remedy

⁷ As discussed above, we find no basis to challenge the agency’s decision not to conduct discussions during the implementation of its corrective action. See n.6.

⁸ Where an agency identifies a potentially latent ambiguity, we have explained that the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. RELI Grp., Inc., B-412380, Jan. 28, 2016, 2016 CPD ¶ 51 at 7-8. Accordingly, we will not object to an agency’s decision to take corrective action by amending the solicitation to resolve a

the flaw which the agency believes exists in its procurement process.⁹ Onésimus, supra, at 5. Accordingly, we find no basis to object to the BOP's corrective action.

Further, to the extent the protester contends that the agency improperly disclosed PREA's price and failed to "level [the] playing field" by disclosing Nakamoto's price, we disagree. See Protest at 11; Comments at 3.

As a general matter, agencies are not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of information in a post-award setting where the release was not the result of preferential treatment or other improper action on the part of the agency.¹⁰ IDEAL, supra, at 5. Here, PREA's price was properly released to its competitors in the context of a post-award notice as required by FAR § 15.503(b), and not as a result of preferential treatment or other improper action on the part of the agency. Therefore, the agency was not required to equalize any competitive advantage that may have resulted from the release of PREA's price.

The protest is denied.

Thomas H. Armstrong
General Counsel

potential ambiguity and adequately address its needs. See e.g., Ripple Effect Commc'ns., Inc., B-413722.2, Jan. 17, 2010, 2017 CPD ¶ 27 at 2-3.

⁹ To the extent PREA asserts that the corrective action is inappropriate because it is not in response to Nakamoto's protest, we disagree. We have explained that our Office's standard for determining whether corrective action is appropriate envisions that the details of a corrective action fall within the sound discretion and judgment of the contracting agency, and accordingly that a particular corrective action will not be objectionable so long as it is appropriate to remedy a reasonable concern raised by the agency. 360 IT Integrated Sols.; VariQ Corp., B-414650.19 et al., Oct. 15, 2018, 2018 CPD ¶ 359 at 6.

¹⁰ Moreover, agencies are not prohibited from taking corrective action in the form of a new competition where the original awardee's prices have been disclosed. Jackson Contractor Grp., Inc., B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 3. The possibility that the contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than does the possibility that the original awardee will be at a disadvantage in the reopened competition. Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 4.