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Decision

Matter of: CPS Professional Services, LLC d/b/a CATHEXIS

File: B-417928.2

Date: February 5, 2020

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Benjamin J. Ratichek, Esq., Department of Veterans Affairs, for the agency.

Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the scope of the agency's corrective action is dismissed as untimely where the protester waited to file its protest until after the completion of the corrective action.

DECISION

CPS Professional Services, LLC d/b/a CATHEXIS, a service-disabled veteran-owned small business (SDVOSB) of Falls Church, Virginia, protests the issuance of a task order to Enterprise Resource Performance, Inc. (ERPi), an SDVOSB of Fairfax, Virginia, under request for task order proposals (RFTOP) No. 36C10X19R0030, which was issued by the Department of Veterans Affairs (VA), Veterans Health Administration for program and project management support services. CATHEXIS argues that the scope of the agency's corrective action, now completed, was insufficient. Specifically, the protester contends that the agency's corrective action, which was comprised of a reevaluation of CATHEXIS's proposal and a new award determination, should have also included allowing CATHEXIS to submit a revised proposal.

We dismiss the protest.

BACKGROUND

On June 21, 2019, the VA posted the RFTOP for competition among SDVOSB holders of the VA's Veteran Enterprise Contracting for Transformation and Operational Readiness Service Group 5 multiple-award, indefinite-delivery, indefinite-quantity contract. The agency intended to acquire support for the VA logistics program office under a task order with a period of performance consisting of a 1-year base period and four 1-year option periods. Agency Report (AR), Tab 7, RFTOP at 5. The due date for proposals was 10 a.m. on July 19. Id. at 1. The solicitation anticipated the issuance of a fixed-price task order to the offeror whose proposal was determined to represent the best value to the agency, considering the factors of technical capability/management plan, past performance, and price. Id. at 36. The technical capability/management plan factor was more important than past performance, and the non-price factors, when combined, were significantly more important than price. Id.

The VA amended the RFTOP on July 3 by posting answers to offeror questions. AR, Tab 8, amend. 0001. On July 19, after the deadline for receipt of proposals, the agency again amended the RFTOP in order to increase the staffing estimates for the base period by four full-time equivalent (FTE) personnel across two task areas. AR, Tab 9, amend. 0002 at 3. The amendment also increased the estimated staffing for each option period by 18 FTEs across four task areas. Id. Amendment 0002 included the following instructions:

The due date for revised proposals has been extended to July 24, 2019 at 5:00pm ET. Supplemental Instructions (For Offerors That Previously Submitted a Proposal): Changes can be made to any volumes previously submitted, however changes are not required and any volume that is unchanged does not need to be resubmitted. It is requested that any changes to other than the price volume be highlighted to assist with the technical review.

Id.

On the same day, the contract specialist, at the contracting officer's request, called each offeror to ask whether it anticipated changing its technical proposal due to the increases in the estimated FTEs. Contracting Officer's Statement of Facts (COS) at 2-3. The contracting officer advised the contract specialist that if offerors anticipated changing their technical proposals due to the increases in the level of effort, the timing of the technical evaluations, which were scheduled to be held on July 23-25, would be impacted. Id. However, at that time, the contracting officer decided not reschedule the technical evaluations, even though proposals were not due until two days after the scheduled start of technical evaluations. Id. at 3-4.

On July 19, the contract specialist called CATHEXIS to ask whether CATHEXIS anticipated changing its technical proposal, as this would require the agency to delay its anticipated start date for the technical evaluation. Protest at 11; B-417928, Protest, exh. N, Decl. of CATHEXIS Proposal Operations Manager ¶ 4. There was a second call

on July 19 between CATHEXIS and the VA on this topic. Id. Because CATHEXIS was still evaluating the impact of amendment 2 on its proposal, in the second call the parties agreed to a follow-up conversation on July 22 to allow CATHEXIS more time to assess whether it needed to revise its technical proposal. Protest at 11; B-417928, Protest, exh. N, Decl. of CATHEXIS Proposal Operations Manager ¶ 5.

In the subsequent call on July 22, the parties agreed that CATHEXIS could submit a basis of estimate (BOE) in lieu of a revised technical proposal. Protest at 12. This BOE would highlight any changes to CATHEXIS's technical proposal and would be provided to the technical evaluation team for their review and consideration.¹ Id. According to CATHEXIS, after the call on July 22, it "was left with the understanding that the agency preferred to keep to the current evaluation schedule, and, to the extent CATHEXIS planned to submit a revised price proposal only--i.e., did not intend to make any revisions to its technical approach--the technical evaluations would proceed as scheduled during the week of July 22nd." Id. at 11.

Therefore, on July 24, citing the VA's July 22 "commitment [by the contract specialist] that the BOE will be presented to the VA technical evaluation team before completion of the technical volume this week," CATHEXIS submitted its proposal and the BOE. AR, Tab 11, BOE & Cover Letter at 1. Other offerors, including ERPi, submitted revised proposals. COS at 4-5.

On August 14, the agency notified offerors of its selection of ERPi as the offeror with the proposal that presented the best value to the agency. The agency provided CATHEXIS with a written debriefing on August 23 and concluded the debriefing in an August 27 conference call. COS at 6. During the debriefings, the VA informed CATHEXIS that it had not evaluated CATHEXIS's BOE because the BOE exceeded the solicitation's relevant page limitation.² B-417928, Protest, exh. N, Decl. of CATHEXIS Proposal Operations Manager ¶ 15.

Cathexis then filed a protest with our Office asserting that the VA: treated offerors unequally by encouraging only CATHEXIS to not submit a revised proposal; failed to evaluate offerors' proposed staffing; failed to evaluate CATHEXIS's BOE, which was inconsistent with the agreement that the BOE was submitted in lieu of a revised

¹ The agency disputes this account, inasmuch as it claims that it did not intentionally discourage CATHEXIS from revising its technical proposal and instead only submitting a BOE. COS at 2-3; AR, Tab 6, Decl. of Contract Specialist ¶ 6. However, while the contract specialist states that he did not in any manner discuss submission of a BOE with CATHEXIS (AR, Tab 6, Decl. of Contract Specialist ¶ 6b) the record reflects that CATHEXIS submitted--and the VA later accepted--a BOE not contemplated by the solicitation. COS at 7 (referring to CATHEXIS's revised technical proposal); AR, Tab 16, CATHEXIS Email to Contract Specialist Confirming Substance of Call.

² The agency later confirmed that the BOE did not increase CATHEXIS's proposal length beyond the relevant page limitation. AR, Tab 17, Best Value Determination at 3.

technical proposal; and made a flawed best-value determination as a result of these errors. B-417928, Protest at 16-28. As relevant to the instant protest, CATHEXIS asked our Office for the following relief:

Recommend that the Agency terminate the award to ERPi and (1) award a task order to CATHEXIS as the best value offeror; (2) reevaluate the proposals in accordance with the stated criteria and make a new award determination; or (3) accept proposal revisions, conduct new evaluations correcting the errors described above, perform a new best value analysis, and award a new task order in accordance with the evaluation criteria set forth in the [RFTOP].

B-417928, Protest at 29-30.

On September 30, the agency requested that our Office dismiss the protest on the basis that the agency intended to take corrective action that would render the protest academic. B-417928, Notice of Corrective Action & Req. for Dismissal, Sept. 30, 2019. The agency concluded that it had improperly failed to consider the information in CATHEXIS's BOE. COS at 6-7. The VA advised our Office as follows:

In the course of reviewing the protest allegations, the VA Contracting Officer has determined that corrective action is in the best interest of the Government. Accordingly, the VA Contracting Officer shall:

- (1) Re-evaluate technical proposals; and
- (2) Make a new best value determination.

B-417928, Notice of Corrective Action & Req. for Dismissal at 2. We dismissed the protest on the basis that the proposed corrective action rendered the protest academic. CATHEXIS, B-417928, Oct. 4, 2019 (unpublished decision).

After re-evaluating all technical proposals, including CATHEXIS's BOE, the VA again selected ERPi for award. AR, Tab 17, Best Value Determination at 29; Protest, exh. 5, Notification of Award, Oct. 19, 2019. This protest followed on October 31.³

DISCUSSION

CATHEXIS argues that the agency's corrective action did not address the prior errors in the procurement, namely, that it was treated differently from other offerors with regard to the submission of a fully-revised proposal. Protest at 24. In this regard, the protester asserts that the agency improperly discouraged it from submitting a revised proposal,

³ The total value of the task order is \$86,199,951.60. AR, Tab 17, Best Value Determination at 31. Because the value of the awarded task order exceeds \$10 million, our Office has jurisdiction to consider the protest. 41 U.S.C. § 4106(f)(2)(B).

and that, although it initially sought a reevaluation of its proposal and BOE as one of several alternate forms of relief, the agency nevertheless should have also allowed for the submission of revised proposals as part of the corrective action.⁴ Id. at 2-3, 23-25.

The agency and the intervenor argue that the protest challenges the scope of the corrective action and is therefore untimely, as it was brought more than 10 days after CATHEXIS knew or should have known of the basis of its protest. Memorandum of Law (MOL) at 1-2; Intervenor Comments at 2; see also 4 C.F.R. § 21.2(a)(2). In this regard, the intervenor contends that the protest is not, as the protester described, a challenge to the implementation of the corrective action, but rather to the scope of the corrective action. MOL at 2; Intervenor Comments at 3.

Protests based on alleged solicitation improprieties that are apparent prior to the deadline for submitting proposals must be filed before that deadline. 4 C.F.R. § 21.2(a)(1). A protest allegation that challenges the ground rules that the agency has announced for performing corrective action and recompetition is analogous to a challenge to the terms of a solicitation and also must be filed prior to the deadline for submitting revised proposals. Veterans Evaluation Servs., Inc., et al., B-412940.26 et al., Jan. 5, 2017, 2017 CPD ¶ 17 at 11. Where, as here, no further submissions are anticipated, such challenges must be raised within 10 days of when the scope of the agency's corrective action was known or should have been known. 4 C.F.R. § 21.2(a)(1); Delta Risk, LLC, B-416420, Aug. 24, 2018, 2018 CPD ¶ 305 at 14. The record shows that CATHEXIS's arguments concerning the scope of the agency's corrective action are based on information that was known or should have been known to the protester more than 10 days prior to the filing of this protest.

On September 30, the agency provided our Office and the parties with notice of its proposed corrective action that would address the alleged deficiencies in its evaluation. B-417928, Notice of Corrective Action & Req. for Dismissal at 2. In doing so, the Agency expressly stated that its corrective action would consist of reevaluating technical proposals and making a new best-value determination. Id. On October 4, our Office dismissed CATHEXIS's protest as academic. CATHEXIS, B-417928, Oct. 4, 2019 (unpublished decision). CATHEXIS did not protest the agency's proposed corrective action within 10 days when the protester knew or should have known of the scope of the agency's corrective action. Instead, CATHEXIS waited to file its protest until October 31.

CATHEXIS asserts that it "had no reason to believe the VA's proposed corrective action would fail to address the primary aspect of its [protest] until after the VA issued an award to ERPi without requesting proposal revisions." Protester Comments at 10. Yet, the protester's complaint here about the agency's corrective action is that, "[d]espite CATHEXIS'[s] protest and the VA's decision to take corrective action, the VA did not request a revised technical proposal from CATHEXIS, or take any other action to

⁴ Although not all of the CATHEXIS' protest arguments are discussed below, we have considered them all, and none provides a basis to sustain the protest.

correct its failure to request technical revisions from all offerors in order to create an equal playing field.” Protest at 21-22 (emphasis omitted). However, the protester knew that the agency did not intend to request revised proposals. B-417928, Notice of Corrective Action & Req. for Dismissal at 2. The protester asserts that, “[p]roblematically, the Agency’s corrective action did not address the unequal environment its actions had created during the initial evaluation of offerors for purposes of the technical proposals.” Protest at 24. Yet this “unequal environment” is, again, a failure to “allow CATHEXIS to submit a revised technical proposal during the corrective action.” Id. The protest grounds here are, in substance, a challenge to the scope of the agency’s corrective action. Given the clearly limited scope of the agency’s corrective action, the protester’s arguments are untimely. Delta Risk, LLC, supra, at 17-18.

The protest is dismissed.⁵

Thomas H. Armstrong
General Counsel

⁵ The agency’s decision to reevaluate proposals and make a new award determination is precisely one of the possible bases of relief sought by the protester, and quoted above. Offering to take this action rendered the protest academic. CATHEXIS, B-417928, Oct. 4, 2019 (unpublished decision), see also B-417928, Protest at 29-30. However, CATHEXIS nevertheless hoped the corrective action would allow for revised proposals, in order to implement further revisions beyond those contained in its basis of estimate. Protest at 25 (“Given that the technical evaluation team evaluated CATHEXIS based solely on the technical proposal CATHEXIS submitted on July 19, 2019 and the technical revisions identified in the July 24, 2019 BOEs, the strengths and ratings assigned to CATHEXIS did not include the revisions CATHEXIS would have made to its technical proposal had it been given that opportunity, as ERPi and several other offerors were.”) (emphasis and internal citations omitted).

The protester’s challenge to the agency’s best-value tradeoff determination rests on the success of its argument that the agency should have requested revised proposals. Protest at 26-27. This derivative argument does not establish an independent basis of protest. Accordingly, it too is dismissed. Technology & Telecomms. Consultants, Inc., B-415029, Oct. 16, 2017, 2017 CPD ¶ 320 at 6.