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Decision

Matter of: Vetterra, LLC

File: B-417991; B-417991.2; B-417991.3

Date: December 29, 2019

Tom Porto, The Popham Law Firm, PC, for the protester.
Azine Farzami, Esq., Rural Development Administration, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly exercised option to extend services filed more than 10 days after agency informed protester of its intent is dismissed as untimely.
 2. Protest that order issued under Blanket Purchase Agreement (BPA) is outside the scope of the BPA is denied where services ordered do not change the nature of the work required and the solicitation effectively advised offerors of the potential for the type of services ordered.
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DECISION

Vetterra, LLC, of Lenexa, Kansas, protests the decision of the Department of Agriculture (USDA) to extend, for a period of six months, call order No. 1231ME18F0072, issued to Clarocity Valuation Services, LLC, of Carlsbad, California, under Blanket Purchase Agreement (BPA) No. AG-31ME-B-16-0005, for appraisal services. Vetterra asserts that the agency's decision to exercise the option to extend the call order for six months was unreasonable and violates the Federal Acquisition Regulation (FAR). Vetterra also argues that the call order that was issued to Clarocity is outside the scope of the BPA.

We dismiss in part and deny in part the protest.

BACKGROUND

The BPA here was established with Valued Veterans, LLC on September 15, 2016, pursuant to request for quotations (RFQ) No. AG-31ME-S-16-0008. Agency Report (AR), Tab 3, BPA at 1. The RFQ provided that the period of performance would be three years from the date of award. AR, Tab 4, RFQ at 1. The RFQ also included

FAR clause 52.217-8, Option to Extend Services, which provided the agency with the option to extend services for six months beyond the end of the BPA, and FAR clause 52.217-9, Option to Extend the Term of Contract. Id. at 5. The BPA established with Valued Veterans provides that the period of performance would be September 19, 2016, through September 18, 2019. BPA at 1-2. The BPA also states that the period of performance would be three consecutive years with an option to extend services for six months at the sole discretion of the USDA. AR, Tab 5, BPA Terms and Conditions at 3.

On August 31, 2017, the agency modified the BPA to recognize that Valued Veterans changed its name to Clarocity Valuation Services. BPA Modification 1 at 1. As in the underlying BPA, modification 1 also included FAR clause 52.217-8, and FAR clause 52.217-9, which stated that the period of performance was for 3 years. On September 4, 2018, the agency issued call order No. 1231ME18F0072 to Clarocity, with a period of performance from September 19, 2018 through September 18, 2019. Agency Response to Second Request for Information (RFI), exh. 4, Call Order at 2.

On September 6, 2019, a representative of Vetterra contacted the agency and learned that the agency planned to exercise the six-month option to extend services related to the call order with Clarocity. Response to Req. for Dismissal at 1. At that time, the agency also informed Vetterra that there would be no published notice or public confirmation of the agency action. Id. On September 18, the agency issued a modification to the BPA to exercise the option to extend the BPA's ordering period through March 18, 2020. BPA Modification 3 at 1. On September 18, the agency also issued a modification to the call order that had been issued to Clarocity to extend the period of services to March 18, 2020. Agency Response to Second RFI, exh. 4, Call Order Modification 1 at 2. On September 19, Vetterra submitted its protest to our Office.

DISCUSSION

Vetterra initially asserted that the agency unreasonably exercised the option to extend services under the call order.¹ Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules require that a protest based on other than alleged improprieties in a solicitation be filed no later than 10 calendar days after the protester knew or should have known its basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, the protester knew on September 6 that the agency intended to exercise the option to extend services in Clarocity's call order. Since Vetterra did not submit its protest until September 19, more than ten calendar days after it learned of the option exercise, it is untimely.²

¹ While our decision does not address every issue, we have considered all of the protester's arguments and find that none provide a basis to sustain the protest.

² Vetterra initially attempted to file its protest with our Office on September 13, via Federal Express. Response to Req. for Dismissal at 2. Our Office informed Vetterra that it needed to refile the protest through our Electronic Protest Docketing System

Vetterra argues that our Office should consider its untimely protest under the good cause or significant issue exceptions to our timeliness rules. Response to Req. for Dismissal at 3. Pursuant to 4 C.F.R. § 21.2(c), our Office may consider the merits of an untimely protest where good cause is shown or where the protest raises a significant issue of widespread interest to the procurement community. In order to prevent our timeliness rules from becoming meaningless, however, exceptions are strictly construed and rarely used. Hawker Beechcraft Def. Co., LLC, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 n.4.

The good cause exception to GAO's timeliness rules is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a timely protest. Vetterra has provided nothing that would allow us to conclude that it was unable to timely file a protest with our Office.

What constitutes a significant issue is decided on a case-by-case basis. Cyberdata, Techs., Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 3. We generally regard a significant issue as one of widespread interest to the procurement community and that has not been considered on the merits in a prior decision. Baldt Inc., B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3. Vetterra's untimely protest does not present a significant issue since our Office has previously considered the merits of exercising an option to extend services in a protest. See Major Contracting Services, Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170.

During the course of the initial protest, Vetterra submitted a timely supplemental protest after receiving a copy of the 2017 modification 1 to the BPA, which was provided to Vetterra in conjunction with the agency's dismissal request. Vetterra argues that the agency acted improperly when it exercised the option to extend services for six months because, in Vetterra's view, that option was eliminated from the underlying BPA when the agency issued modification 1 in 2017. Supp. Protest, Oct. 18, 2019, at 4. As noted, the initial BPA solicitation included FAR clause 52.217-8, Option to Extend Services, which provides:

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance

(EPDS). Id. As established by our regulations, EPDS is GAO's web-based electronic docketing system and our website includes instructions and guidance on the use of EPDS. See 4 C.F.R. § 21.0(f). EPDS is the method used for filing initial protests and protest related documents. Under our regulations, "[a] document is filed on a particular day when it is received in EPDS by 5:30 p.m., Eastern Time." 4 C.F.R. §§ 21.0(g) and 21.1(b). Delivery of a protest or other document by means other than those set forth in the online EPDS instructions does not constitute a filing. 4 C.F.R. § 21.0(g). Vetterra refiled its protest through EPDS on September 19.

hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 60 days prior to expiration of the current period of performance.

RFQ at 5. The BPA solicitation also included FAR clause 52.217-9, Option to Extend the Term of the Contract, which provides:

(a) The Government may extend the term of this contract by written notice to the Contractor within 30 days prior to expiration of the current period of performance; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) * * *

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed three (3) year[s] and (6) months.

Id. When the agency issued the BPA, it also indicated that the period of performance was three consecutive years with an option to extend services for six months at the sole discretion of the USDA. AR, Tab 5, BPA Terms and Conditions at 3.

When the agency issued modification 1 to the BPA in 2017, it did not specifically indicate that clause 52.217-9 was being modified. Agency Response to Second RFI, exh 2, BPA Modification 1 at 1. Nonetheless, the terms and conditions attached to the modified BPA under FAR clause 52.217-9(c), Option to Extend the Term of the Contract, provided that the total duration of the contract was three years. Id. at 4. The BPA, as altered by modification 1, continued to provide the period of performance as September 19, 2016 through September 18, 2019--the original period of performance when the agency established the BPA. Id. at 2. The modified BPA also included FAR clause 52.217-8, Option to Extend Services, which gave the agency the option to extend services by six months. Id. at 3-4.

According to the protester, because as set out in clause 52.217-9 the modified BPA stated that the duration of the BPA was only three years--instead of three years and six months, as stated in the original version of the BPA--the agency could no longer exercise the six-month option to extend services under FAR clause 52.217-8. The protester makes this argument even though the 2017 modification also included clause 52.217-8, reserving the right to extend performance for up to six months. The protester argues that given the agency's inability to now extend the underlying BPA due to the 2017 modification, the agency also cannot extend the services under the call order.

The agency asserts that it properly exercised the option pursuant to FAR clause 52.217-8. Contracting Officer Statement/Memorandum of Law (COS/MOL) at 3, 7; Agency Response, Nov. 6, 2019. In addition, the agency argues even if clause

52.217-9, Option to Extend the Term of the Contract, provided that the duration of the contract was three years, this did not negate the agency's ability to exercise the independent six-month option to extend services in accordance with clause 52.217-8. Agency Response, Nov. 12, 2019, at 1-4. According to the agency, nothing in that clause suggests an intent to limit the temporary extensions afforded under other clauses, such as FAR clause 52.217-8. Id.

Despite the complexity of the protester's contentions about whether the agency could, or could not, extend this BPA and call order, the agency fully responded to these contentions. In the face of the agency's response, the protester did not substantively reply to the agency's argument that regardless of any modification to FAR clause 52.217-9, Option to Extend the Term of the Contract, the agency had the right to exercise an option period of up to six months pursuant to FAR clause 52.217-8, Option to Extend Services.³ Accordingly, we consider this basis of protest abandoned.⁴ Safeguard Base Operations, LLC, B-415588.6, B-415588.7, Dec. 14, 2018, 2018 CPD ¶ 426 at 4.

On November 12, in responding to Vetterra's protest that the agency could not properly extend the call order for six months, and that the modifications to the BPA and call order were not signed, the agency submitted complete copies of the BPA, call order, and modifications. Based on the information learned from those documents, on November 15, Vetterra submitted a second supplemental protest arguing that call order 1231ME18F0072 included services that were outside the scope of the BPA as issued. Comments, Nov. 15, at 2-3. Vetterra specifically complained that call order 1231ME18F0072, included two reports--Market Value Pro RE Exterior (MVPro RE Exterior) and Capital Improvements Addendum, that were not included in the RFQ or the BPA, and were therefore outside the scope of the BPA. Id.; Supp. Protester Comments, Nov. 19, 2019, at 1. Vetterra contends that because the call order was outside the scope of the BPA, the agency issued a call order to Clarocity on a sole-source basis with no justification to do so.⁵

³ At best, the protester argued that since the agency modified clause 52.217-9 to reduce the period of performance to three years, it could not exercise an option that deviates from the terms of the modified contract.

⁴ The protester also argued that the agency improperly exercised the option to extend services under FAR clause 52.217-8 because several of the modifications to the call order and BPA were not signed by the contracting officer. Comments, Nov. 5, 2019, at 6-8. In response, the agency provided copies of the documents that were signed by the contracting officer and the vendor. The protester did not reply to the agency so we also consider this issue abandoned, as well.

⁵ In Vetterra's comments on the agency's response to its supplemental protest, Vetterra raised a number of additional challenges to support its position that the call order was outside the scope of the BPA. For example, Vetterra asserted that the MVP Pro RE exterior serviced a branch of the Department of Agriculture, separate from the branch

The appraisal services here were procured under the simplified acquisition procedures of FAR subpart 13.5. RFQ at 1. Procurements conducted under simplified acquisition procedures are exempt from the statutory requirement to obtain full and open competition; instead, contracting officers are required to promote competition to the maximum extent practicable. 41 U.S.C. § 1901(c); FAR §§ 13.104; Gichner Systems Grp., Inc., B-414287, et al., Apr. 27, 2017, 2017 CPD ¶ 129 at 8. However, when using simplified acquisition procedures, sole-source acquisitions are permitted only if they are justified in writing. FAR § 13.501.

In determining whether a call order is outside the scope of an underlying contract (or in this case, a BPA), and subject to the requirement for competition, our Office considers whether there is a material difference between the call order and the underlying BPA. See Tempus Nova, Inc., B-412821, June 14, 2016, 2016 CPD ¶ 161 at 4 (order issued under Federal Supply Schedule BPA was outside the scope of the BPA and subject to competition). Evidence of a material difference is found by reviewing the circumstances attending the original procurement; any changes in the type of work, performance period, and costs between the contract as awarded and the order as issued; and whether the original solicitation effectively advised offerors of the potential for the type of orders issued. See Western Pilot Service et al., B-415732, et al., Mar. 6, 2018, 2018 CPD ¶ 104 at 6 (task order under contract); Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6 (task order under contract). The overall inquiry is whether the order is of a nature which potential offerors reasonably would have anticipated.

Here, we find that the call order was within the scope of the BPA as issued. The RFQ requested a turnkey range of services to include, but not limited to, appraisal services compliant with all federal, state and local statutes, regulations and ethical standards applicable to the liquidation of loan security and collection of debts for respective states. RFQ at 1, 2, 80, 81. The performance work statement (PWS) listed common appraisal forms that might be required, including Fannie Mae Exterior-only inspection appraisal report (form 2055), RFQ at 85, and Fannie Mae URAR (form 1004), RFQ at 84-85. The MVP Pro RE exterior appraisal report (that Vetterra specifically identifies as outside the scope of this BPA) is a variation of the Fannie Mae Exterior-only appraisal report that

that issued the solicitation, and one that was not included as a point of delivery under the solicitation. Comments, Nov. 22, 2019, at 1. As a second example, Vetterra asserted that the MVP Pro RE exterior appraisal form is not approved by Freddie Mac, Fannie Mae, the Department of Housing and Urban Development, or the Department of Veterans Affairs, as required by the original BPA. Id. at 3. These bases of protest were known to Vetterra no later than when Vetterra received the November 12 agency response to Vetterra's supplemental protest. Vetterra did not raise these issues in its November 15 protest. A protester is required to raise all protest arguments of which it is aware and that support its position when it files its initial protest; otherwise the later raised arguments constitute piecemeal protests which are untimely and will not be considered. Technology and Telecommunications Consultants, Inc., B-415029, Oct. 16, 2017, 2017 CPD ¶ 320 at 4-5 n. 4.

the RFQ expressly identifies. Agency Response to GAO Question, Nov. 21, 2019, at 2. Similarly, the Capital Improvements Addendum was an addendum to a report (URAR) that was also required. Id. at 3. The addition of a similar report, and an addendum to a required report, do not change the nature or type of the work required. See Western Pilot Service et al., supra; Data Transformation Corp., supra. Given that the solicitation did not state that the list of common appraisal industry reports was an exclusive list, there is no basis to conclude that offerors could not anticipate the purchase of these reports under the solicitation. Accordingly, we deny this allegation.

The protest is dismissed in part and denied in part

Thomas H. Armstrong
General Counsel