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Decision

Matter of: Leidos, Inc.

File: B-418242.5

Date: March 3, 2020

Sharon L. Larkin, Esq., and James M. Larkin, Esq., The Larkin Law Group LLP, for the protester.

Richard J. Conway, Esq., Michael J. Slattery, Esq., and Carolyn Cody-Jones, Esq., Blank Rome LLP, for Perspecta Enterprise Solutions LLC, the intervenor.

Audrey Roh, Esq., Jonathan E. English, Esq., and Julie K. Cannatti, Esq., Department of Housing and Urban Development, for the agency.

Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's corrective action in response to earlier protests is dismissed where the corrective action rendered the earlier protest academic and where the challenge is otherwise premature.

DECISION

Leidos, Inc., of Reston, Virginia, protests the pre-award actions taken by the Department of Housing and Urban Development (HUD) in connection with request for proposals (RFP) No. 86543D18R00001 for HUD enterprise architecture transformation end user (HEAT EU) services. The protester contends that the agency's corrective action must include reopening discussions because the agency previously engaged in misleading discussions with Leidos.

We dismiss the protest as premature at this juncture.

BACKGROUND

The RFP was issued on February 5, 2018, using Federal Acquisition Regulation subpart 16.5 procedures, to holders of the National Institutes of Health Information Technology Acquisition and Assessment Center, Chief Information Office, Solutions and Partners 3 governmentwide acquisition contracts. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 3. The HEAT EU procurement is part of HUD's

initiative to transform its business and information technology (IT) landscape through modernization, with the objective of meeting its business requirements across mission areas through enterprise IT services. Agency Report (AR), Tab 10, RFP, at 8.¹ The successful offeror will provide services and equipment to support a secure end-user environment, a tiered help desk, dashboards with real-time data feeds, service enabled devices or appliances, project management, and relocation and modernization of equipment. Id. at 13-14. The RFP contemplates award of a hybrid fixed-price, cost-plus-fixed-fee, cost-reimbursement, and time-and-materials task order with a period of performance consisting of a base year and six option years. Id. at 3-7, 83.

The agency received three proposals, including one from Leidos,² by the April 9 due date. COS/MOL at 4. More than a year later, on July 16, 2019, HUD issued RFP amendment 0009, which made several changes to the solicitation, including how equipment should be priced. RFP at 2. The next day, the agency sent Leidos a discussion letter and enclosed RFP amendment 0009. AR, Tab 14, Leidos Discussions Letter. The discussion letter set forth evaluation weaknesses and discussion items; none of the discussion items concerned how Leidos priced equipment. Id. On July 23, the agency held oral discussions with Leidos. COS/MOL at 4. On July 26, the agency issued a request for final proposal revisions (FPR), which were due on August 9. AR, Tab 16, Leidos Request for Final Proposal Revision Letter.

On October 1, HUD notified Leidos that it had not been selected for award. AR, Tab 20, Leidos Unsuccessful Offeror Letter. Leidos was provided with a written debriefing in which it was advised that “[w]hile Leidos proposed a technically superior proposal as evidenced in the higher rating in the technical approach factor, the technical superiority did not support the cost premium or differential of approximately 129% (total 7 year evaluated price).” AR, Tab 22, Leidos Debriefing Letter, at 5.

On November 1, Leidos filed a protest with our Office.³ On November 6, the agency requested that our Office dismiss the protest. Specifically, the agency argued that Leidos was not an interested party because, while the evaluators originally found Leidos’ proposal to be technically acceptable, the agency conducted a “reevaluation or redetermination” and found that the Leidos proposal did not comply with the solicitation’s pricing instructions with respect to equipment, or alternatively, failed to meet a material solicitation requirement, and thus was ineligible for award. Req. for Dismissal (B-418242), Nov. 6, 2019, at 2-5. Based on the agency’s new evaluation conclusion that Leidos’ proposal was ineligible for award, Leidos filed its second

¹ The RFP was amended nine times during the procurement. Citations in this decision are to the conformed version of the RFP provided by the agency.

² The initial proposal was submitted by Leidos Innovations Corporation, however, as a result of a corporate merger, the final proposal revision was submitted by Leidos, Inc. See COS/MOL at 4 n.2.

³ Leidos additionally filed three supplemental protests on November 7, 12, and 22.

supplemental protest, and alleged that the agency had engaged in misleading discussions concerning its pricing. Supp. Protest (B-418242.3), Nov. 12, 2019, at 3-6.

Rather than file its report in response to the protest, the agency advised our Office that it intended to take corrective action, and requested that the protests be dismissed. Over the protester's objection, our Office dismissed the protests as academic "[b]ecause the corrective action will result in a new source selection decision." Leidos, Inc., B-418242 et al., Dec. 3, 2019 (unpublished decision). This protest followed.⁴

DISCUSSION

Leidos argues that the scope of the corrective action is inadequate and insufficient to remedy the issues raised in its prior protests. Protest at 4. Leidos contends that "the agency intends to stand by its position that Leidos' proposal is ineligible for award due to its pricing of equipment, despite the fact that Leidos was misled to believe, during discussions after issuance of the latest RFP amendment, that its pricing of equipment was correct." Id. The protester argues that the agency must reopen discussions to provide clear instructions regarding offerors' cost/price proposals in order to correct the misleading discussions it held with Leidos, as well as to address its other protest allegations regarding the insufficiency of the awardee's proposal. Id. at 5.

The agency argues that it did not engage in misleading discussions with Leidos, and its corrective action is appropriate to remedy the flaws the agency has identified in the procurement. COS/MOL at 16-20. The agency also argues that the protest is premature. Req. for Dismissal at 2-7. We agree that the protest is premature.

The agency's notice of corrective action stated that it would "reassess the Final Proposal Revisions for all offerors and make changes, as appropriate, to the evaluation and source selection documents in accordance with the solicitation and applicable laws and regulations." Req. for Dismissal (B-418242.1 et al.), Nov. 26, 2019, at 1. The agency was silent regarding whether it would conduct discussions with offerors. See id. After the agency issued the corrective action notice, Leidos contacted the agency and was informed that the agency would not reopen discussions. See Resp. to Req. for Dismissal (B-418242.1 et al.), Dec. 2, 2019, at 1. As a result, Leidos filed this protest with our Office.

The agency filed a request for dismissal disputing that it informed Leidos that it would not hold discussions. Req. for Dismissal at 2. The agency states that it informed Leidos that the misleading discussions protest ground lacked merit and the agency would proceed as outlined in its notice of corrective action. Id. The agency's dismissal request also stated that "HUD's Notice of Corrective Action did not explicitly state that HUD will not reopen discussions. . . [and] Leidos' protest merely anticipates adverse

⁴ This protest is within our jurisdiction to hear protests related to task and delivery orders placed under civilian agency multiple-award indefinite-delivery, indefinite-quantity contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B).

action by the Agency.” Id. at 4, 5. However, the agency also argued that it did not conduct misleading discussions with Leidos and that Leidos’ proposal was unacceptable. Id. at 9 n.5, 10-13.

Subsequently, the agency stated that it did not intend to reopen discussions with Leidos. COS/MOL at 12 (“[T]he Agency has now stated that it does not intend to reopen discussions”). However, in the same filing to our Office, HUD also stated as follows:

To the extent that GAO denies or dismisses this protest, HUD’s corrective action in this protest will proceed as follows: First, we intend to conduct a new compliance review of the FPR proposals, including reassessing the proposals for any failure to meet a material requirement, and eliminate such non-compliant/unacceptable proposals from the competition. Then, we intend to reevaluate the remaining acceptable proposals. At that point, we may decide to hold discussions with those remaining offerors.

AR, Tab 53, Decl. of Contracting Officer, at 4 (¶ 18).

As a general rule, 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. Northrop Grumman Sys. Corp., B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309 at 8. The details of a corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. MSC Indus. Direct Co., Inc., B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5.

Our prior decisions have also considered the timing of protests challenging the propriety of an agency’s proposed corrective action. In doing so, in those instances where the agency’s proposed corrective action alters or fails to alter the ground rules for the competition (*i.e.*, aspects that apply to all offerors or vendors), we have considered a protester’s challenge of such to be analogous to a challenge to the terms of a solicitation, thus providing the basis for protest prior to award. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8; Northrop Grumman Info. Tech., Inc., B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 10; *see* 4 C.F.R. § 21.2(a)(1). However, in those instances where the agency’s proposed corrective action does not alter the ground rules for the competition, we have considered a protester’s pre-award challenge to be premature. 360 IT Integrated Solutions; VariQ Corp., B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 10; SOS Int’l, Ltd., B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2.

Here, there is no dispute that Leidos, at some point, should again have the opportunity to challenge the adequacy of the agency’s discussions with respect to its pricing of equipment--assuming that the issue is not made moot by the agency’s corrective action. That challenge cannot be considered now, however, because as set forth above, the

agency has said both that (1) it will not reopen discussions, and (2) it may reopen discussions after its reevaluation. Therefore, we cannot conclude that the agency will not reopen discussions after a new reevaluation is completed. Accordingly, we do not view the ground rules of this procurement to have been changed in a manner that warrants our pre-award review. Cf. Domain Name Alliance Registry, supra, at 8 (the agency's actions from the time it initiated the corrective action until the second award decision clearly indicated that the agency did not contemplate holding discussions). Until the agency completes its reassessment of all proposals for compliance with the solicitation and concludes how it will further proceed with corrective action, the protest is premature.⁵ If HUD takes concrete action in the future that may properly form the basis for a valid bid protest, the protester may file a protest with our Office at that time, consistent with our Bid Protest Regulations.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

⁵ We recognize that the agency has asserted that Leidos' FPR failed to comply with a material solicitation requirement and is ineligible for award. See Req. for Dismissal (B-418242), Nov. 6, 2019, at 2-5; COS/MOL at 20. As a general rule, we accord greater weight to contemporaneous source selection materials rather than judgments, such as the agency's reevaluation here, made in response to protest contentions. Nexant, Inc., B-407708, B-407708.2, Jan. 30, 2013, 2013 CPD ¶ 59 at 11, quoting Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Specifically, the lesser weight that we accord these post-protest documents reflects the concern that, because they constitute reevaluations and redeterminations prepared in the heat of an adversarial process, they may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Id. at 12.