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Decision

Matter of: Bastion Technologies, Inc.

File: B-418432

Date: May 5, 2020

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DIGEST

1. Protest of an agency's interpretation of a solicitation, after the agency disclosed its interpretation of the solicitation's terms via written notice stating that it would not evaluate part of the protester's proposal submission, is ripe for review but is denied where the agency's interpretation of the solicitation is reasonable and the protester's alternative interpretation is unreasonable.
 2. Protest alleging errors in the evaluation of past performance is dismissed as premature when brought during an ongoing evaluation, prior to award.
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DECISION

Bastion Technologies, Inc. (Bastion), of Houston, Texas, protests the National Aeronautics and Space Administration's (NASA) interpretation of the terms of request for proposals (RFP) No. 80JSC019R0023 for products and services in support of human space flight programs. The protester challenges the agency's interpretation of the solicitation's past performance submission requirements and the agency's decision not to consider Bastion's submitted past performance information forms (PPIFs).

We deny the protest.

BACKGROUND

NASA issued the RFP on November 1, 2019, seeking proposals to provide products and services to support technical integration activities and necessary infrastructure

functions for human space flight programs, including the International Space Station program, the Orion program, and the Gateway program. Agency Report (AR), Tab 1, RFP at 0011, 0029;¹ Contracting Officer's Statement (COS) at 1. The RFP contemplated the award of a cost-plus-award fee/incentive-fee, indefinite-delivery, indefinite-quantity (IDIQ) contract for a 60-day phase in period, a 2-year base period, and three 1-year option periods. RFP at 0007. The RFP provided for award on a best-value tradeoff basis, considering three evaluation factors: mission suitability, past performance, and cost. *Id.* at 0686. The mission suitability and past performance factors, when combined, were stated to be more important than cost, with mission suitability being more important than past performance. *Id.*

As relevant here, section L.16.4.1 of the RFP required offerors to demonstrate their past performance by submitting PPIFs. *Id.* at 0645-0646. The RFP specified that “[o]nly one contract shall be described per PPIF.” *Id.* at 0646. The RFP also specified that “[o]fferor[s] shall submit past performance information for no more than three contracts” per team member. *Id.* The RFP’s general instructions for proposal preparation provided that offerors should include in their proposals “any further discussion believed to be necessary or useful in demonstrating your ability to perform the work under this contract.” *Id.* at 0638.

Section M.3.2.1(b) of the RFP provided that, in addition to the PPIFs submitted by the offerors, the agency would use past performance information independently obtained from government and commercial sources in its evaluation. *Id.* at 0688. The RFP stated that such sources included, but were not limited to, the past performance information retrieval system (PPIRS) and similar systems, interviews with client program managers and contracting officers, and other sources known to the government. *Id.* Section M.3.2.1(c) of the RFP provided that past performance would be evaluated considering three aspects: recency, relevance, and performance. *Id.* at 0689. As relevant here, the RFP specified that when considering recency, past performance “on an ongoing contract where the contractor has not worked greater than nine months will be given less weight.” *Id.*

On December 16, 2019, before the closing date for receipt of proposals,² Bastion submitted its proposal to the agency. AR, Tab 19, Receipt for Bastion Proposal. Bastion’s proposal included three PPIFs that discussed its own past performance. AR, Tab 18, Bastion Past Performance Proposal at 2090-2105. Bastion’s first PPIF identified three contract numbers, three award dates, three start dates, and three sets of estimated and final costs. *Id.* at 2090. Bastion’s description of work in its first PPIF discussed its performance on an additional 8 years of contract performance not

¹ NASA used a Bates numbering system in preparing the agency’s report. Citations to the AR in this decision refer to the Bates numbers assigned by the agency.

² The closing date for receipt of proposals was December 18, 2019. AR, Tab 4, RFP amend. 2 at 1500.

captured by the listed contract start dates. *Id.* at 2091. Bastion's self-assessment of performance under these contracts discussed the last five years of performance, which covers the performance period of two of the listed contracts. *Id.* at 2091. Bastion's second PPIF identified two contract numbers, two award dates, two start dates, and two sets of estimated and final costs. *Id.* at 2095. The self-assessment in the second PPIF discussed the last five years of performance, which spanned the performance period of the two listed contracts. *Id.* Bastion's third PPIF identified two contract numbers, two award dates, two start dates, and two sets of estimated and final costs. *Id.* at 2100. Bastion's third PPIF also contained a description of an additional 7 years of performance not captured by the listed contract start dates. *Id.* In its third PPIF, Bastion's self-assessment discusses the last five years of work, which spanned the performance period of the two listed contracts. *Id.*

On January 22, 2020, the agency notified Bastion that it would not consider its submitted PPIFs because they violated the RFP's instruction that each proposal was limited to three contract references per team member and that only one contract should be described per PPIF. AR., Tab 17, Notice to Bastion, January 22, 2020, at 2049. On January 29, Bastion filed this protest.

DISCUSSION

The protester challenges the agency's interpretation of the RFP's past performance submission requirements and the resulting decision not to consider Bastion's submitted PPIFs. Specifically, Bastion argues that the RFP contains a latent ambiguity that caused Bastion to submit PPIFs that the agency found to violate the RFP's submission requirements. Protest at 17-20; Comments at 5-6. Bastion also argues that the agency improperly found Bastion's PPIFs to be noncompliant with the RFP's submission requirements. Protest at 11-17; Comments at 3-5.

NASA responds that Bastion's protest challenges the agency's evaluation judgements during the ongoing evaluation and should therefore be dismissed as premature. See Request for Dismissal. With regard to Bastion's allegation that the past performance submission requirements were ambiguous, the agency argues that these requirements were not reasonably susceptible to more than one meaning.³ MOL at 9-10. For the reasons that follow, we find no basis to sustain the protest.

³ NASA also addresses the merits of Bastion's other contentions, arguing that it reasonably found Bastion's submitted PPIFs to be noncompliant with the RFP's submission requirements, Memorandum of Law (MOL) at 3-6; that it properly refused to evaluate the nonconforming PPIFs to prevent an unfair competitive advantage, *Id.* at 6-7; and that Bastion cannot establish competitive prejudice. *Id.* at 7-8.

Allegation of Latent Ambiguity

The protester asserts that the solicitation's terms with regard to the submission of past performance information are ambiguous, claiming that the RFP is subject to two reasonable interpretations. Protest at 17-20. In this regard, Bastion alleges that (1) the instructions to "describe" one contract per PPIF and (2) general instructions to submit additional information useful to determining an offeror's ability to perform, when considered along with the RFP's provision that recent ongoing contracts could be given less weight, could reasonably be interpreted in more than one way. Comments at 5-6. The protester contends that its discussion of multiple prior contracts for the same scope of work within a PPIF did not run afoul of the submission instructions, but instead was merely meant to provide context and what it interpreted as useful information to the agency, to demonstrate and describe its capabilities. *Id.* at 6.

The agency argues that this protest ground is a challenge to the agency's evaluation judgments that should be dismissed as premature. Request for Dismissal at 4. The agency specifically contends that the protester's use of contingent language in this protest ground⁴ makes its resolution dependent on the prior resolution of the other allegedly premature protest grounds. *Id.* Alternatively, the agency responds that the RFP's instructions were not ambiguous, but to the extent an ambiguity may have existed it was patent, and any protest of such an ambiguity had to be made prior to the closing date for receipt of proposals.⁵ MOL at 9-10.

As an initial matter, we note that this case comes before us in an unusual procedural posture. On the one hand, challenges to the terms of a solicitation, to be timely, must be filed in our Office prior to the deadline for submitting proposals. 4 C.F.R. § 21.2(a)(1). The protest grounds here, including the challenge to the terms of the solicitation, do not fall under that timeliness requirement because before Bastion submitted its proposal and received the January 22 notice from NASA that its PPIFs would not be considered, it had no basis to know that NASA interpreted the RFP in a manner that was inconsistent with Bastion's interpretation. In other words, Bastion is alleging not only that the RFP terms are ambiguous, but that the alleged ambiguity was latent.

Protests that an agency has evaluated proposals in a manner that is inconsistent with the terms of a solicitation generally are filed after the agency announces its source selection decision, consistent with the requirement that a protest must be filed within

⁴ Bastion argued the solicitation contained a latent ambiguity "to the extent" that the agency reasonably determined Bastion described more than one contract per PPIF. Protest at 17.

⁵ Bastion filed its protest with our office after the closing date; it filed within 10 days of receiving NASA's January 22 notice explaining the agency's interpretation of the RFP's past performance submission instructions.

10 days of when the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). We typically dismiss as speculative and premature protests alleging that an agency intends to evaluate proposals in a manner inconsistent with the terms of a solicitation where the protest is filed prior to the agency's actual evaluation of proposals. See *Sikorsky Aircraft Corp.*, B-416027, B-416027.2, May 22, 2018, 2018 CPD ¶ 177 at 8 (citing *Cryo Techs.*, B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 at 2 n.1). However, where, as here, the agency makes clear its interpretation of the solicitation through substantive written notice during its evaluation, it may render an issue sufficiently final such that our Office's consideration of the issues during the ongoing evaluation is the most efficient, least intrusive method to resolving the dispute. See *Blue Origin, LLC*, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289 at 8-9 (protest of agency interpretation of solicitation filed after agency made clear its evaluation was based on an interpretation of solicitation that differed from protester's interpretation, was timely where the protester brought a timely agency-level protest regarding the issue, and protest was filed with GAO within 10 days of notice that agency-level protest was denied).

This separate protest ground, alleging that the agency's interpretation of the RFP's terms was inconsistent with Bastion's interpretation in a way that was not apparent before the closing date for receipt of proposals, is not premature because the agency has effectively announced its interpretation. It is also not untimely, because the agency's notice to Bastion, in which it rejected Bastion's submitted PPIFs, disclosed the agency's interpretation of the solicitation's terms, and Bastion filed its protest with our Office within 10 days of receiving the notice disclosing the agency's interpretation of the RFP's past performance submission instructions. We therefore turn to the merits of the argument.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. *Intelsat General Corp.*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree about 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 specifications of the solicitation are possible. *Argus Int'l Risk Servs., LLC*, B-411682, B-411682.2, Sept. 25, 2015, 2015 CPD ¶ 303 at 5. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Id.* A party's particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation is reasonable and susceptible of the understanding that it reached. *The HP Group, LLC*, B-415285, Dec. 14, 2017, 2017 CPD ¶ 385 at 5.

We conclude that Bastion's interpretation of the RFP was not reasonable. The solicitation provisions, when read in light of the solicitation as a whole, are not susceptible to the reading advanced by the protester and Bastion therefore has not shown that the RFP was ambiguous. The past performance submission instructions

were clear that “[o]nly one contract shall be described per PPIF” and each offeror “shall submit past performance information for no more than three contracts” per team member. RFP at 0646. The protester does not provide a reasonable alternative meaning to these challenged terms. The other solicitation language relied on by the protester--that offerors were asked to “describe” past contracts and provide additional information useful to determining an offeror’s ability to perform--does not conflict with the RFP’s explicit limitations. General instructions that offerors should provide as much useful information as they can, or that very recent contract references may be accorded less weight⁶, do not require or permit submission of multiple contract numbers, award dates, start dates, and cost/price data in excess of clearly established limitations. See, e.g., AR, Tab 18, Bastion Past Performance Proposal at 2090. The protester’s argument about the instructions and its assumptions about how to complete the PPIFs do not demonstrate that the solicitation was ambiguous. Accordingly, this protest ground is denied.

Evaluation of Bastion’s PPIFs as Not Compliant

Bastion challenges the agency’s conclusion that its PPIFs were not compliant with the RFP’s past performance submission requirements, arguing the agency unreasonably found that Bastion’s PPIFs each described more than one contract. Protest at 11-17; Comments at 3-5. The protester contends that the agency’s decision not to consider its PPIFs on the above basis preclude a reasonable evaluation and harmed Bastion’s standing in the competition. Comments at 4-5.

The agency first responds that these arguments are premature protests of evaluation judgments. Request for Dismissal at 2-3. The agency further responds by addressing the merits of the allegations in a variety of ways, which we need not address here, since we agree that these protest grounds are premature evaluation challenges.

Here, the RFP provided that the agency would use past performance information from sources other than the PPIFs in its evaluation. RFP at 0688. The agency also noted that its rejection of Bastion’s PPIFs was not a rejection of Bastion’s entire past performance record. Request for Dismissal at 2. NASA informed Bastion that despite the rejection of its PPIFs, the agency continued to evaluate Bastion under the past performance factor. AR, Tab 17, Notice to Bastion, January 22, 2020, at 2050. Given these facts, while Bastion may have been placed on notice of the manner in which the

⁶ It is unclear why Bastion believes the RFP’s past performance evaluation scheme may have limited the agency’s consideration of Bastion’s ongoing contracts. The RFP provision at issue stated that “[e]xperience on an ongoing contract where the contractor has not worked greater than nine months will be given less weight.” RFP at 0689; Protest at 18-19. However, all three of Bastion’s submitted ongoing contract references had started work at least 19 months before the November 1, 2019 date from which the agency was to measure recency. See RFP at 0689; see also AR, Tab 18, Bastion Past Performance Proposal at 2090, 2095, 2100.

agency interpreted these particular terms of the RFP, the conclusion that Bastion has drawn regarding the impact of this interpretation on the agency's evaluation of Bastion's proposal is premature.

In sum, we dismiss these protest grounds because they are a challenge of the agency's ongoing past performance evaluation prior to award and are therefore premature. See *Sikorsky Aircraft Corp.*, *supra* at 15-16. After the agency has completed its evaluation and source selection, if Bastion is excluded from the competitive range or not selected for award, it may raise whatever evaluation challenges it deems appropriate, including the agency's decision to not consider its PPIFs, at that time, consistent with our bid protest regulations. See *Intermarkets Global*, B-400660.10, B-400660.11, Feb. 2, 2011, 2011 CPD ¶ 30 at 4-5.

The protest is denied.

Thomas H. Armstrong
General Counsel