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Decision

Matter of: Nelnet Diversified Solutions, LLC

File: B-418870.2; B-418870.3; B-418870.4

Date: October 19, 2020

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Megan R. Nathan, Esq., and John W. Kim, Esq., Department of Education, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to the evaluation of the protester’s small business participation plan as unacceptable is denied where the agency’s evaluation was consistent with the terms of the solicitation, which required offerors to propose small business participation as a percentage of the total contract value, rather than as a percentage of the dollars subcontracted.

2. Protest that the agency improperly failed to amend the solicitation because it knew or should have known that its requirements had changed prior to award is denied where, even if the agency should have amended the solicitation, there is no reasonable possibility that the protester could have been prejudiced by the agency’s failure to do so.

DECISION

Nelnet Diversified Solutions, LLC, of Lincoln, Nebraska, challenges the award of contracts by the Department of Education (DOE) to Edfinancial Services LLC, of Knoxville, Tennessee, F.H. Cann & Associates LLC, of North Andover, Massachusetts, MAXIMUS Federal Services Inc., of Falls Church, Virginia, the Missouri Higher Education Loan Authority, of Chesterfield, Missouri, and the Texas Guaranteed Student

Loan Corporation, of Round Rock, Texas, under request for proposals (RFP) No. 91003119-R-0008, which was issued for services in support of the Office of Federal Student Aid's (FSA's) Business Process Operations (BPO) requirement. The protester argues that the agency improperly found its proposal unacceptable under the small business participation factor, and that the agency should have amended the solicitation because it knew or should have known prior to the award that its requirements had changed.

We deny the protest.

BACKGROUND

DOE issued the solicitation on January 15, 2019, seeking proposals to provide support for FSA, which is responsible for federal financial assistance programs for post-high school students. Agency Report (AR)¹, Tab E, RFP at 1, 4.² The RFP explains that the agency "is embarking on a transformation known as the Next Generation Financial Services Environment (NextGen)," which "seeks to implement a flexible, efficient and effective financial solution to leverage support for our customers, school partners, and taxpayers."³ *Id.* at 3. The BPO requirement is a part of the NextGen program, and contractors will be required to "support efficient and effective operations, across the entire life cycle of student financing (from application for financing, to origination and disbursement, to processing and servicing and pay-off or default)," "provide an enhanced level of service, across the full life cycle of student financing, beyond today's environment," and "support the seamless transition of customers and partners from existing to new solutions. . . ." *Id.* at 7.

The RFP anticipated the award of multiple indefinite-delivery, indefinite quantity (IDIQ) contracts with a base period of 3 years and one 3-year option. *Id.* at 3. The contracts will provide for the issuance of fixed-price task orders.⁴ *Id.* The maximum ordering value for the contracts is \$1.7 billion and the minimum guaranteed value for each

¹ Citations to the agency report are to the PDF pages of the documents provided.

² The agency provided the original RFP and all amendments at Tab E of the agency report. All citations to the RFP are to the conformed final version issued in solicitation amendment 9, unless otherwise noted.

³ Customers are "student[s], parent[s], [and] borrower[s]." RFP at 5.

⁴ The RFP advised that the agency would "establish common pricing, common performance metrics and a common Performance Work Statement (PWS) prior to contract award." RFP at 65; see *also id.* at 70. The common pricing will be the basis upon which orders are issued. *Id.* at 65. The solicitation stated that firms selected for award would be offered contracts based on the common pricing, performance metrics, and common PWS, and that if a firm rejected the contract, the agency could elect to offer the next-highest rated offeror a contract. *Id.* at 75.

contract is \$1.5 million. *Id.* The solicitation advised that proposals would be evaluated on the basis of the following factors: (1) technical approach, (2) past performance, (3) small business participation, and (4) price. RFP at 75-78. For purposes of award, the non-price factors, when combined, were “significantly more important” than price. *Id.* at 74.

As discussed below, DOE issued seven amendments to the solicitation prior to the initial closing date of August 2. These amendments included numerous questions and answers (Q&As). DOE received initial proposals from 14 offerors, including Nelnet. AR, Tab Q, Price Negotiation Memorandum (PNM) at 3. The agency issued RFP amendment 8 on January 9, 2020, which as relevant here, revised the small business subcontracting plan (SBSP) requirements and required offerors to submit revised proposals. RFP amend. 8 at 1, 3-4. The agency issued RFP amendment 9 on January 24, which included a conformed copy of the solicitation and additional Q&As. RFP at 1. Nelnet submitted a revised proposal prior to the closing date of January 31. Contracting Officer’s Statement (COS) at 14. The agency concluded that Nelnet’s revised proposal was unacceptable under the small business participation factor, and was therefore ineligible for award. AR, Tab Q, PNM at 8-9.

DOE advised Nelnet on June 18 that its proposal had been found unacceptable and ineligible for award. AR, Tab R, Unsuccessful Offeror Notice, June 18, 2020, at 1. On June 24, the agency awarded contracts to Edfinancial Services LLC, F.H. Cann & Associates LLC, MAXIMUS Federal Services Inc., the Missouri Higher Education Loan Authority, and the Texas Guaranteed Student Loan Corporation. COS at 29. This protest followed.

DISCUSSION

Nelnet raises two primary challenges to DOE’s rejection of its proposal from award consideration: (1) the agency unreasonably found the protester’s proposal unacceptable under the small business participation factor; and (2) the agency should have amended the solicitation because it knew or should have known prior to award of the contracts that its requirements had changed, and should have provided Nelnet and the other offerors an opportunity to submit a revised proposal.⁵ For the reasons discussed below, we find no basis to sustain the protest.

Small Business Participation Factor Evaluation

Nelnet argues that DOE improperly found its proposal unacceptable under the small business participation factor, and therefore ineligible for award, for three reasons: (1) the agency unreasonably interpreted the requirements of the evaluation factor; (2) the evaluation factor requirements were latently ambiguous; and (3) the agency knew or should have known that offerors had differing understandings of the

⁵ Nelnet also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

requirements of the evaluation factor, and therefore should have either amended the solicitation or conducted discussions to ensure that offerors were competing on a common basis. We find that none of these arguments have merit.

Original RFP, Amendments 1-7, and Nelnet's Initial Proposal

The original version of the RFP required offerors to submit a "small business subcontracting plan in accordance with the requirements of" Federal Acquisition Regulation (FAR) clause 52.219-9, Small Business Subcontracting Plan. Original RFP at 61. The solicitation identified the following subcontracting goals:

Small Businesses 32%, Women Owned Small Businesses [(WOSBs)] 5%, Small Disadvantaged Businesses [(SDBs)] 5%, Service Disabled Veteran Owned Small Businesses [(SDVOSBs)] 3%, Historically Underutilized Business Zones (HUBZones) 3%. Subcontracting must meet a minimum total of 32%, which is inclusive of all small businesses, regardless of subcategory. Offerors are strongly encouraged to exceed the cited goals. The plan will be reviewed for compliance with FAR 19.705-4.

Id. The original version of the RFP did not have an associated evaluation factor for the small business subcontracting plan.

Prior to the time set for receipt of initial proposals, the agency issued RFP amendments 3 and 4, which added a new evaluation factor for small business participation. The revised proposal instructions in section L of the RFP required all offerors to submit a small business participation plan, and required other than small business offerors to also submit a small business subcontracting plan:

Offerors shall submit the following documents, as applicable, depending on whether they are a Small (as defined in Title 13 CFR Part 121) or Other Than Small Business:

a. All Offerors (both small businesses and Other Than Small Businesses) are required to provide a Small Business Participation Plan (SBPP) in accordance with the instructions in Attachment 24.

– Offerors shall propose the level of participation of Small Businesses (as a small business prime, through subcontracting, and/or through other appropriate business relationships) in the performance of this acquisition. Small business firms shall be specifically identified in the SBPP by name and socio-economic category and evidenced by a current record in the System for Award Management (SAM).

– The SBPP will become a part of the resultant contract. Notwithstanding any other term of this contract, successful Offerors will be contractually bound to the terms of the SBPP.

– An Offeror will not be eligible for award if it fails to submit an acceptable SBPP.

b. Offerors who are Other Than Small Businesses shall also provide a small business subcontracting plan in accordance with the requirements of FAR 52.219-9. Subcontracting plans will be reviewed as part of the responsibility determination of the apparent winner to determine if they are acceptable. An Other Than Small Business will not be eligible for award if it fails to submit an acceptable subcontracting plan. Subcontracting plans shall reflect and be consistent with the commitments offered in the Small Business Participation Plan.

RFP amend. 4 at 61. The small business subcontracting goals were also revised, as follows:

Note the Department of Education’s Subcontracting goals, each of which must be addressed in the plan(s): Small Businesses 32%, Women Owned Small Businesses 5%, Small Disadvantaged Businesses: 5%, Service Disabled Veteran Owned Small Businesses 3%, Historically Underutilized Business Zones (HUBZones) 19%. . . .

Id. at 62.⁶

The new small business participation factor in section M of the RFP advised that proposals that did not meet the mandatory requirements for small business participation plans and small business subcontracting plans would be ineligible for award:

An Offeror will not be eligible for award if it submits an SBPP that does not meet all minimum requirements. An Other Than Small Business will also not be eligible for award if it fails to submit an acceptable subcontracting plan that reflects and is consistent with the commitments offered in the Small Business Participation Plan.

Id. at 66. The RFP further stated that the minimum requirements for the small business participation plan included, as relevant here, the following:

The SBPP meets the minimum mandatory Total Small Business Participation goal by showing participation by small business equal[s] 32%

⁶ Although these instructions concerned subcontracting goals, the agency states that the RFP required both the small business subcontracting plan and the small business participation plan to meet these goals. COS at 29. Nelnet agrees with the agency’s interpretation; as discussed, the protester’s disagreement with the agency’s interpretation concerns whether the participation and subcontracting percentages relate to the total contract value or the dollars subcontracted. Protester’s Comments at 17.

of the total value of the effort, through collective small business participation from any type of small business or sub-category small business, whether small business prime or first tier small business subcontractor.

The SBPP meets or exceeds the small business sub-category participation goals.

Id.

In response to questions about these requirements, the agency provided the following answers, which advised that small business subcontracting plans should propose goals based on the percentage of the total contract value:

[Question 41] FAR 52.219 requires that subcontracting goals are “expressed in terms of total dollars subcontracted, and as a percentage of total planned subcontracting dollars” (FAR 52.219-9(d)(1)). Please confirm the small business goal of 32% as stated in L-2.4.5 is based *on the percentage of planned subcontracting dollars*.

[Answer 41] The subcontracting goal is *32% of the total contract value*.

* * * * *

[Question 215] Is the 32% small business subcontracting percentage stated in Section L-2.4.5 an agency goal, where offerors will be evaluated on how close they come to meeting 32% of contract value, or is it an explicit requirement of the solicitation that an offeror must propose to subcontract a minimum of 32% of the total contract value to small business?

[Answer 215] Offeror’s Small Business Participation Plan (SBPP) must meet the *minimum mandatory Total Small Business Participation goal (32%)* through collective small business participation from any type of small business or sub-category small business, whether small business prime or first tier small business subcontractor.

RFP amend. 4, attach. 23, Q&As at 6, 24 (emphasis added).

Nelnet submitted its initial proposal by the closing date of August 2, 2019.⁷ COS at 9. The protester states that it understood the provisions of the RFP through amendment 7 to require offerors to propose that small businesses would perform 32 percent of the

⁷ DOE also issued RFP amendments 5, 6, and 7 prior to the initial closing date; none of these amendment affected the solicitation provisions at issue here.

“total contracting dollars,” and submitted a proposal that conformed to this requirement. Comments at 14.

RFP Amendments 8 and 9

On January 9, 2020, DOE issued RFP amendment 8. The preface of the amendment advised that the RFP’s small business subcontracting goals had been revised. RFP amend. 8 at 4. This preface instructed offerors to revise their small business subcontracting plans by identifying subcontracting goals as a percentage of both total contract dollars and total subcontract dollars:

Individual Subcontracting Goals based on Total Contract Value – Offerors shall revise their original Subcontracting Plan submission based on the Department of Education’s new small business subcontracting goals. Reference Section L-2.4.4 for additional details. In addition, Offerors shall update the subcontracting plan element referenced in FAR 52.219(d)(1) which states the following:

“(d) The Offeror’s subcontracting plan shall include the following:

(1) Separate goals, expressed in terms of total dollars subcontracted, and as a percentage of total planned subcontracting dollars, for the use of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. *For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. . . .*”

As a result, subcontracting goals shall be expressed in terms of a percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. . . .

Id.

The proposal instructions in section L of the RFP added the following new provision, consistent with the guidance in the preface: “For individual subcontracting plans, Offerors shall submit subcontracting goals expressed as a percentage of total contract dollars *in addition to* the goals expressed as a percentage of total subcontract dollars, in accordance with FAR 52.219-9(d)(1).” *Id.* at 76. The proposal instructions also revised the small business subcontracting requirement from 32 percent to 47 percent. *Id.* at 77. The evaluation criteria in section M remained the same, with the exception that the “the minimum mandatory Total Small Business Participation goal” was revised from 32 percent to 47 percent. *Id.* at 80.

RFP amendment 9 did not revise the small business participation factor, but included the following relevant Q&A:⁸

[Question 35] Regarding FSA's goal of 47% for small business subcontracting: Does this percentage represent the percentage of total contract revenue the BPO contractor must pay to small business contractors, or does it mean 47% of the revenues the BPO contractor pays to all subcontractors (small and other-than-small businesses)?

[Answer 35] See FAR Clause 52.219-9(d)(1) & (d)(2). BPO Small Business Subcontracting goals are not revenue based. Goals are based on total dollars subcontracted *in addition to* total contract value.

RFP amend. 9, attach. 32, Q&As at 3.

Nelnet's Revised Proposal and DOE Evaluation

Nelnet submitted a revised proposal on January 30 that included updated small business participation and small business subcontracting plans. AR, Tab G, Nelnet Revised Proposal. The protester states that it believed that the revised solicitation language in RFP amendment 8, and the agency's response in Q&A No. 35 in RFP amendment 9, changed the requirements of the small business participation factor. In Nelnet's view, these two amendments established that the subcontracting goals for both the small business participation plan and the small business subcontracting plan were to be expressed as a percent of subcontracted dollars, rather than a percent of the total contract value. Comments at 2, 14.

The agency's small business participation evaluation panel (SBPEP) reviewed Nelnet's revised small business participation plan and found it did not meet the RFP requirements in the following areas: [DELETED] percent of the total contract value with small businesses, rather than the required 47 percent; [DELETED] percent of the total contract value with HUBZone firms, rather than the required 19 percent; and [DELETED] of the total contract value with SDVOSBs, rather than the required 3 percent. AR, Tab M, SBPEP Evaluation Consensus Report at 12-13. The panel concluded that the failure to meet these requirements merited the assignment of weaknesses. *Id.*

With respect to other requirements, the panel found that the protester's proposal complied with the solicitation, such as the requirements to submit the required small business participation plan and to commit "to engage one or more small businesses [in] manual processing activities." *Id.* Additionally, the panel assigned strengths for areas where the proposal exceeded the RFP's minimum requirements, including exceeding the minimum requirements for participation by WOSBs and SDBs. *Id.* at 12-13. The

⁸ The Q&As in RFP amendment 9 were provided in a new attachment 32 and started with Q&A No. 1, rather than continuing the numbered list of Q&As from attachment 23.

panel concluded that although the proposal did not meet all of the minimum requirements for the evaluation factor, it also exceeded other minimum requirements. *Id.* at 14. The panel therefore assigned an overall rating of satisfactory, rather than “a potential rating of ‘Unsatisfactory.’” *Id.* at 14-15.

The panel also identified what it believed were discrepancies between the percentages identified in the protester’s small business participation plan and its small business subcontracting plan. *Id.* For example, the panel found that the small business participation plan identified a goal of [DELETED] percent participation for small business, whereas the small business subcontracting plan stated that 47 percent of subcontracts would be awarded to small businesses. *Id.* The contracting officer concluded that the apparent discrepancies required clarification to determine whether the protester’s proposal was acceptable. COS at 21. On May 7, the agency sent Nelnet an email requesting that it “clarify” the small business participation percentages listed in its proposal. AR, Tab N, Clarifications Request at 1.

Nelnet’s response to the clarification request explained that, as required by the RFP, its proposed participation goals were expressed as a percentage of the total contract value and of the dollars subcontracted. AR, Tab O, Nelnet Response at 1-2. For example, the protester stated the following for overall small business participation:

Table 2 of Nelnet’s SBSP indicates Nelnet will subcontract [DELETED]% of subcontracted dollars to small businesses. As required by the terms of the procurement, Nelnet also states this goal in terms of total contract dollars--[DELETED]%-in both the SBSP and the SBPP.

Nelnet’s total small business subcontracting goal of [DELETED]% well exceeds FSA’s stated goal of 47%.

Id. at 2. The protester provided similar responses regarding SDBs, WOSBs, SDVOSBs, and HUBZone small businesses. *Id.* at 4-11.

The SBPEP reviewed Nelnet’s response and found that it “confirm[ed] that the offeror made material errors in [its] SBPP by miscalculating each of their small business participation percentages based on ‘Percentage of Subcontracted Dollars’ vs. the required method of determining percentages based on ‘Total Contract Value.’” AR, Tab P, SBPEP Revised Nelnet Evaluation at 7. As a result of these material errors, the panel found that “none of the percentages in the Nelnet SBPP are accurate or meet the minimum mandatory [small business] participation requirements and constitute material errors” *Id.* at 7-8. Despite these material errors, the panel concluded that the protester’s proposal merited a rating of satisfactory based on the combination of evaluated strengths and weaknesses. *Id.* at 2.

The contracting officer found Nelnet’s proposal failed to meet the minimum 47 percent participation goal for small business, as a percentage of the total contract value, and was therefore ineligible for award. AR, Tab Q, PNM at 8-9. The contracting officer

disagreed with the SBPEP's evaluation of Nelnet's proposal for the small business participation factor, and concluded that the failure to meet the minimum participation percentages rendered the proposal unacceptable. *Id.* The contracting officer noted that, under the RFP evaluation criteria, "an Offeror will not be eligible for award if it submits an [small business participation plan] that does not meet all minimum requirements." *Id.* at 9 (*citing* RFP at 77).

Nelnet's Challenges to DOE's Interpretation of the RFP

Nelnet argues that DOE unreasonably found its proposal unacceptable under the small business participation factor because its small business participation plan proposed to subcontract [DELETED] percent of the total contract value to small businesses, and thus did not show "participation by small business equal [to] 47% of the total value of the effort." Comments at 5, 18-21 (*citing* AR, Tab Q, PNM at 8-9). The protester argues that the meaning of the term "total value of the effort" in connection with the small business participation plan cannot be read in isolation, and must be understood in the context of the agency's instructions for small business subcontracting plans. The protester further argues that the agency's amendments to the RFP show that small business subcontracting plans were required to meet percentage goals based on dollars subcontracted, rather than the total contract value. Finally, the protester argues that reading the small business subcontracting plan requirements together with the small business participation plan requirements shows that the agency's evaluation of its proposal as unacceptable under the latter was unreasonable. We find no merit to these arguments.

Where a dispute exists as to a solicitation's requirements, we begin by examining the plain language of the solicitation. See *Bluehorse Corp.*, B-414809, Aug. 18, 2017, 2017 CPD ¶ 262 at 5. When a protester and agency disagree over 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. *Constructure-Trison JV, LLC*, B-416741.2, Nov. 21, 2018, 2018 CPD ¶ 397 at 3.

Here, we start with the plain language of the small business participation factor, which as amended, contains two requirements: (1) an acceptable small business participation plan, and (2) an acceptable subcontracting plan that "reflects and is consistent with the commitments offered" in the small business participation plan. RFP at 77. As relevant here, the small business participation plan must satisfy the following two requirements:

- The SBPP meets the minimum mandatory Total Small Business Participation goal by showing *participation by small business equal [to] 47% of the total value of the effort*, through collective small business participation from any type of small business or sub-category small business, whether small business prime or first tier small business subcontractor.

- The SBPP *meets or exceeds the small business sub-category participation goals.*

Id. (emphasis added).

Nelnet first argues that the term “total value of the effort” does not mean that small business participation plans were required to propose that small businesses would participate in 47 percent of the value of the contract. Comments at 13. Instead, the protester contends that this term must be understood in context of other parts of the RFP. *Id.* Specifically, the protester argues that “‘total value of the effort’ can mean different things to different offerors, depending on whether they were small or large businesses.” *Id.*

For a large business, the protester contends the required level of small business participation must be achieved through first-tier subcontracts; in contrast, a small business could achieve the required level of small business participation through a combination of its own performance and first-tier subcontracts. *Id.* The protester infers from this contention that, for large businesses, small business participation plans and small business subcontracting plans must meet the same requirements. *Id.* In turn, as discussed below, the protester argues that the small business subcontracting plan requirements must be interpreted in a way that shows that offerors were required to subcontract 47 percent of dollars subcontracted to small businesses. *Id.* As a consequence, the protester contends that the term “total value of the effort” necessarily means “total value of the effort to be subcontracted.” *Id.*

Taking the small business participation plan requirement in isolation, we find that the agency’s interpretation is consistent with the plain meaning of the term “total value of the effort.” Nelnet’s argument ignores the plain and obvious meaning of this term, which clearly refers to all work to be performed under the contract. The protester’s argument, in essence, requires the addition of a term that is not present in the text of the provision: “total value of the effort [to be subcontracted].” Because the protester’s argument is inconsistent with the plain language of the solicitation, and requires the addition of modifying words not present, we conclude it is not reasonable. *See The Boeing Co.*, B-412441, Feb. 16, 2016, 2016 CPD ¶ 269 at 13. We therefore agree with the agency that the term “total value of the effort” means that offerors must propose participation by small businesses equal to 47 percent of the total value of the contract.

We next consider Nelnet’s argument that when the small business participation plan and small business subcontracting plan requirements are read together as a whole, they demonstrate that “participation by small business equal [to] 47% of the total value of the effort,” meant that large businesses were required only to subcontract 47 percent of the amount the large business elected to subcontract. In support of this interpretation, Nelnet argues that the history of the RFP amendments shows that DOE instructed offerors to submit small business subcontracting plans with percentage goals

based on dollars subcontracted, rather than the total contract value. Comments at 6-13, 15-18.

Prior to the issuance of RFP amendment 8, the RFP required offerors to submit small business subcontracting plans “in accordance with the requirements of FAR 52.219-9.” RFP amend. 4 at 61. In addition to this instruction, Q&A No. 41 in RFP amendment 4 stated that small business subcontracting goals were expressed as a percentage of the “total contract value.” RFP amend. 4, attach. 23, Q&As at 6.

Nelnet acknowledges that the RFP, prior to amendment 8, required offerors to propose subcontracting goals as a percentage of the total contract value. Comments at 2, 5, 9. The protester contends, however, that this requirement was “contrary” to the requirements of FAR clause 52.219-9, which states that goals should be expressed as a percentage of “total dollars subcontracted.” *Id.* at 5. The clause states as follows:

(d) The Offeror’s subcontracting plan shall include the following:

(1) Separate goals, *expressed in terms of total dollars subcontracted, and as a percentage of total planned subcontracting dollars*, for the use of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. *For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. . . .*

FAR clause 52.219-9 (emphasis added).

Nelnet further notes that FAR 19.704(a)(2) requires that “[e]ach subcontracting plan . . . shall include . . . [a] statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business . . . as a percentage of total subcontract dollars.” Comments at 9 (*citing* FAR 19.704(a)(2)). Notwithstanding what the protester characterizes as a conflict between the RFP and the FAR, the protester states that it understood the requirements set forth in RFP amendment 4 and that it based its initial proposal on these directions. *Id.* at 2, 14.

Nelnet argues that RFP amendment 8 materially revised the small business subcontracting plan requirement because it “directly” instructed offerors to follow the mandate in FAR clause 52.219-9 that subcontracting goals be based on a percentage of dollars subcontracted. *Id.* at 6. The protester asserts that the agency must have intended to rectify the conflict between the “default” instruction in the FAR clause and the contrary instruction in Q&A No. 41 in RFP amendment 4. *Id.* at 5-6. The protester also points to Q&A No. 35 in RFP amendment 9, which responded to a question asking whether the small business goals represent a percentage of the “total contract revenue the BPO contractor must pay to small business contractors,” or “47% of the revenues

the BPO contractor pays to all subcontractors.” *Id.* at 6 (*quoting* RFP amend. 9, attach. 32, Q&As at 3). The agency answered by referring offerors to “FAR clause 52.219-9(d)(1) & (d)(2)” and advising that: “BPO Small Business Subcontracting goals are not revenue based. Goals are based on total dollars subcontracted *in addition to* total contract value.” RFP amend. 9, attach. 32, Q&As at 3..

In turn, Nelnet argues that the references to FAR clause 52.219-9 in RFP amendment 8 and Q&A No. 35 in RFP amendment 9 concerning small business subcontracting plans informed how large business offerors should have understood the requirement for the small business participation plan--under which the agency found the protester’s proposal unacceptable. The protester and agency agree that the small business subcontracting goals apply to the goals for small business participation plans and small business subcontracting plans. COS at 29; Comments at 17. Thus, assuming large business offerors were required to submit their subcontracting plans based on goals set forth as a percentage of the dollars to be subcontracted as directed by FAR clause 52.219-9, the protester argues that large business offerors were also required to submit small business participation plans that met goals set forth as a percentage of the dollars to be subcontracted. Comments at 13, 17, 21.

Nelnet contends that it reasonably relied on this information in the preparation of its revised proposal. Specifically, the protester states that it changed its small business participation plan and small business subcontracting plan by reducing the level of participation--from a percentage of the total contract value to a percentage of the dollars subcontracted. *Id.* at 2, 14, 23-24.

We conclude that RFP amendment 8 and the Q&As in RFP amendment 9 did not revise the small business participation factor in the manner argued by the protester. Prior to the issuance of solicitation amendment 8, the RFP required offerors to provide a small business subcontracting plan “in accordance with the requirements of FAR 52.219-9.” RFP amend. 3 at 63; RFP amend. 4 at 61. Along with this reference, however, Q&A No. 41 in RFP amendment 4 directed offerors to submit small business subcontracting plans in terms of total contract value. RFP amend. 4, attach. 23, Q&As, at 6. Thus, contrary to the protester’s assertion, RFP amendment 8 did not issue new guidance regarding compliance with the provisions of FAR clause 52.219-9.

The new guidance in RFP amendment 8 directed offerors to “update the subcontracting plan element referenced in FAR 52.219[-9](d)(1)” by revising their plans to include two forms of data: goals as a percentage of the total contract value and goals as a percentage of dollars subcontracted. RFP amend. 8 at 4. Nothing in RFP amendment 8, however, explicitly stated that offerors should disregard the prior guidance to propose goals as a percentage of the total contract value and to instead propose goals only as a percentage of dollars subcontracted.

Further, the protester’s interpretation of RFP amendment 8 ignores the guidance of Q&A No. 35 in RFP amendment 9, which stated that “[g]oals are based on total dollars subcontracted *in addition to* total contract value.” RFP amend. 9, attach. 32 at 3

(emphasis added). RFP amendment 8 and Q&A No. 35 in RFP amendment 9 directed offerors to submit information in both formats without stating which format was the minimum requirement. The protester does not reasonably explain why RFP amendment 8's requirement to include new information expressing goals as a percentage of total contract value should have been interpreted to change the RFP to require offerors to propose on the opposite basis--as a percentage of dollars subcontracted.

On this record, we find that the existing interpretation of the small business subcontracting plan requirement in Q&A No. 41 in RFP amendment 4 thus remained in effect: percentage goals must be based on the total contract value. For this reason, we find no basis to conclude that RFP amendment 8 expressly revoked the prior guidance that offerors propose subcontracting goals as a percentage of the total contract value.

In any event, even if Nelnet were correct that RFP amendment 8 expressly revised the instructions for submission of small business subcontracting plans in the manner it argues, we find no merit to the protester's argument that the amendment affected the requirements for the small business participation plan.

We agree with Nelnet that the RFP's requirement for small business participation, in effect, required large businesses to subcontract to small businesses. The protester does not, however, reasonably explain why a change to the small business subcontracting plan requirement to percentage of dollars subcontracted standard would revise the plain language of the small business participation plan requirement. This requirement specifically stated that all offerors must ensure that "participation by small business equal 47% of the total value of the effort. . . ." RFP at 77. In this regard, the RFP stated that an offeror must submit "an acceptable subcontracting plan that reflects and is consistent with the commitments offered in the Small Business Participation Plan." *Id.* The protester, in effect, seeks to reverse this requirement by arguing that changes to the small business subcontracting plan requirements impliedly changed the plain language of the small business participation requirement. This inference is neither supported by the plain language of the RFP, nor sufficient to contradict the plain meaning of the term "total value of the effort."

On this record, we find that the agency reasonably interpreted the RFP as requiring small business participation plans and small business subcontracting plans to satisfy the goals for small businesses expressed as a percentage of the total contract value. We also find unreasonable the protester's interpretation of the RFP as requiring offerors to meet small business participation and small business subcontracting goals based on the percentage of work subcontracted.

Solicitation Ambiguity

Next, Nelnet argues that even if DOE's interpretation of the RFP is reasonable, the term "total value of the effort" was latently ambiguous. Protest at 22 n.9; Comments

at 21-25. The protester argues that such a latent ambiguity requires the agency to amend the solicitation. Comments at 25-27. We find no merit to this argument.

An ambiguity exists when two or more reasonable interpretations of the terms or specifications of the solicitation are possible. See *Ashe Facility Servs. Inc.*, B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 10. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle or nonobvious. *Id.* A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. *LCLC Inc./CfMRF*, B-414357, May 22, 2017, 2017 CPD ¶ 153 at 5. A party's 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 Grp., LLC*, B-415285, Dec. 14, 2017, 2017 CPD ¶ 385 at 5.

For the reasons discussed above, we conclude that the protester's interpretation of the small business participation plan requirement concerning the term "total value of the effort" is not reasonable. We also find no basis to conclude that any changes to the requirements for the small business subcontracting plan changed the meaning of the term "total value of the effort." Because we find the protester's interpretation unreasonable, there is no basis to conclude that the RFP was ambiguous. See *Bastion Techs., Inc.*, B-418432, May 5, 2020, 2020 CPD ¶ 163 at 5-6.

Offerors' Divergent Understandings of the RFP

Next, Nelnet argues that DOE knew or should have known that offerors did not have a common understanding of the solicitation requirements. Protest at 21-23; Comments at 25-27. The agency found that all of the revised proposals, other than the protester's, met the requirements of the small business participation factor by proposing small business participation goals expressed as a percentage of the total contract value. AR, Tab Q, PNM at 8-9. Under these circumstances, the protester contends, the agency should have amended the solicitation or conducted discussions with Nelnet.⁹ We find no merit to this argument.

Solicitations must be drafted in a fashion that enables offerors to intelligently prepare their proposals and compete on a common basis. *Raymond Express Int'l*, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317 at 9. The agency's description of its needs must be free from ambiguity and describe the agency's minimum needs accurately. *Global Tech. Sys.*, B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 17. We will consider post-award challenges to the terms of a solicitation where the record shows that the solicitation was ambiguous in a manner that prevented offerors from competing on a common basis. See *Arch Sys., LLC; KEN Consulting, Inc.*, B-415262, B-415262.2, Dec. 12, 2017, 2017 CPD ¶ 379 at 10-11.

⁹ The agency states that it did not conduct discussions with any offerors. Memorandum of Law (MOL) at 18.

As discussed above, DOE conducted exchanges with Nelnet after the submission of its revised proposal concerning its small business participation plan. The protester stated that it understood the small business participation factor to require offerors to submit small business participation plans and small business subcontracting plans that stated the percentage goals in terms of the dollars subcontracted, rather than the total contract value. AR, Tab O, Nelnet Clarification Response at 1-2. The protester contends that its response notified the agency that it had a different understanding of the RFP requirements than the other offerors, and that the agency was therefore obligated to amend the solicitation or conduct discussions with the protester. Comments at 26-27.

In support of its argument, the protester cites our decision in *Baytex Marine Commc'n, Inc.*, where we found that significant differences in the prices submitted by offerors following the amendment of the solicitation showed that offerors did not have a common understanding of the revised requirements. 2d Supp. Protest at 7 (*citing Baytex Marine Commc'n, Inc.*, B-237183, Feb. 8, 1990, 90-1 CPD ¶ 164). The protester also cites our decision in *MSI, Div. of the Bionetics Corp.*, where we found that the protester and awardee based their proposals on differing assumptions about the level of services required, as shown by their divergent technical and price proposals. *Id.* (*citing MSI, Div. of the Bionetics Corp.*, B-233090, Feb. 22, 1989, 89-1 CPD ¶ 185).

Our Office has explained however, that that our decision in *Baytex* was rooted in unclear or latently ambiguous solicitation requirements, which resulted in offerors proposing differing products or solutions. See *Centerra Grp., LLC*, B-414768, B-414768.2, Sept. 11, 2017, 2017 CPD ¶ 284 at 5-6. Our Office sustained the protest in *Baytex*, concluding that the agency's "imprecise requirements" precluded offerors from competing on a common basis. *Baytex, supra*, at 4; see also *Centerra Grp., LLC, supra*. Similarly, our decision in *MSI* found that the solicitation was "confusing" and that the "lack of clarity" in the requirements should have put the agency on notice that offerors had not competed on a common basis. *MSI, Div. of the Bionetics Corp., supra*, at 4-5.

Here, in contrast, we find no basis to conclude that the solicitation was ambiguous. Nelnet was the only offeror whose proposal did not comply with the RFP requirements for the small business participation factor. Nothing in the record shows that the terms of the solicitation precluded offerors from competing on a common basis; rather, the protester simply misunderstood the solicitation requirements. It is not the case, as the protester's argument implies, that an agency is obligated to amend the solicitation or conduct discussions to address an offeror's misunderstanding of otherwise unambiguous requirements. On this record, we find no basis to sustain the protester's challenge to the evaluation of its proposal as unacceptable under the small business participation factor.

Changed Agency Requirements

Next, Nelnet argues that DOE knew or should have known prior to award that its performance requirements had changed, and that the agency was obligated to amend

the solicitation and allow offerors to submit proposals based on the agency's actual requirements. Supp. Protest at 6-14. For the reasons discussed below, we find no basis to sustain the protest because, even if the protester's argument had merit, there is no reasonable possibility that it could have been prejudiced by the agency's actions in light of its unacceptable proposal under an unrelated evaluation factor.

Where an agency's requirements or terms change after a solicitation has been issued, it must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. FAR 15.206(a); *Murray-Benjamin Elec. Co., L.P.*, B-400255, Aug. 7, 2008, 2008 CPD ¶ 155 at 3-4. Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs. *Global Computer Enters., Inc.; Savantage Fin. Servs., Inc.*, B-404597 *et al.*, Mar. 9, 2011, 2011 CPD ¶ 69 at 8.

The RFP stated that the BPO services "will need to be integrated seamlessly with existing and future solutions provided by FSA or other vendors across the entire life cycle of student financing," and that "all solutions will be implemented with both integration and future scalability in mind, ensuring third-parties can 'plug in' to use common tools and feed into common interfaces." RFP at 6. One of the tools to be used by BPO contractors is the Enhanced Processing System (EPS), which was "intended to be a single platform that performs financial and portfolio level functions related to servicing federally-held student loans and grants, including loan consolidation origination and disbursement." COS at 29-30. The RFP stated that "immediately and on a rapid schedule, FSA anticipates migrating, through conversion, nearly 200 million loan accounts from existing servicers to the Enhanced Processing Solution, while minimizing disruptions for customers." RFP at 6. The solicitation identifies the following timeline for the EPS requirements: "Begin scaling operations in parallel with the start of existing customer accounts migration once the Enhanced Processing Solution is fully operational and ready to start migration (no later than six months after award)." *Id.* at 15.

DOE issued an RFP for the EPS requirement on January 15, 2019--the same date as the issuance of the BPO solicitation. COS at 2, 29. The contracting officer for the BPO solicitation was also the contracting officer for the EPS solicitation. Supp. COS at 1. The agency evaluated proposals for the EPS award and found only the proposal from one offeror (EPS awardee 1) technically acceptable and eligible for award. Supp. Protest at 13. The agency engaged in negotiations with EPS awardee 1 to establish the price, performance metrics, and PWS for the EPS contract. *Id.*; see also EPS Cancellation Determination, July 10, 2020, at 1.

The contracting officer states that negotiations with EPS awardee 1 were "stalled" and came to an end on June 23, 2020. Transcript of Phone Call with Contracting Officer (Tr.) at 17:2-3.¹⁰ The stalled negotiations were the result of the agency's "realiz[ation]

¹⁰ On, September 22, 2020, our Office conducted a phone call with the parties for the purpose of asking questions of the contracting officer. This phone call was transcribed.

that the budget constraints that we [were] under was a little more severe than we thought,” and that “if we were to be able to afford it, either we have to get additional funding or we would have to change the requirements.” *Id.* at 15:15-21; see also *id.* at 12:13-22.

The contracting officer states that she did not cancel the EPS solicitation immediately after the failure of the negotiations with EPS awardee 1 because she believed she needed guidance concerning the EPS requirements. Tr. at 17:2-5; 22:12-18, 27:21-28:11, 29:2-6. On or around June 23, the contracting officer contacted FSA leadership and the NextGen program office for input about the future of the EPS program. *Id.* at 17:2-5, 18:8-11; EPS Cancellation Determination, July 10, 2020, at 1.

DOE awarded the BPO contracts on June 24. COS at 29. On July 6, the NextGen program office advised the contracting officer that a “substantial change in requirements was necessary to adequately address FSA’s needs.” EPS Cancellation Determination, July 10, 2020, at 1; Supp. COS at 1; Tr. at 13:7-15, 13:21-14:5. Additionally, on or about July 6, FSA leadership advised the contracting officer that the agency was considering changes to the requirement, including the possibility of a “transitional servicing solution.” Tr. at 18:16-21; Supp. COS at 1. Based on the information from the NextGen program office and FSA leadership, the contracting officer concluded on July 6 that the EPS solicitation should be cancelled. Tr. at 13:7-15.

The contracting officer documented the basis for her decision on July 10, explaining that “[f]ollowing extensive research and deliberation, the Next Gen Program Office determined that, in order to satisfy FSA’s evolving needs, it must develop and procure additional and/or differing requirements from those stated in the EPS solicitation.” EPS Cancellation Determination, July 10, 2020, at 1. The memorandum further stated that certain “requirements initially due within 6 months of award would not be needed until up to [DELETED] months after award.” *Id.* at 2. The contracting officer also posted a notice cancelling the RFP to the System for Award Management on July 10. COS at 30.

Nelnet argues that DOE knew or should have known prior to the award of the BPO contracts on June 24 that the agency would not pursue the schedule for the EPS requirements set forth in the BPO solicitation.¹¹ Supp. Comments, Sept. 25, 2020, at 2-4. The protester contends that the agency should therefore have known that the BPO solicitation, which called for integration with the EPS solution within 6 months of award, no longer reflected the agency’s requirements.

DOE contends that it was not required to amend the BPO solicitation prior to the awards on June 24 because the contracting officer did not decide to cancel the EPS solicitation

¹¹ The agency states that it has not amended the BPO contracts and does not intend to do so. COS at 31.

until July 6, and did not issue a notice of cancellation until July 10.¹² Agency Supp. Response, Sept. 25, 2020, at 3-4. Although the contracting officer was aware there were problems with the EPS program, she states she had not received responses to her requests for input from FSA leadership and the NextGen program office regarding the EPS requirement as of June 23. Tr. at 17:2-5, 18:8-11. The contracting officer further states that she did not want to take any final actions regarding the EPS solicitation before receiving those responses. *Id.* at 29:2-6.

The record here shows that the contracting officer was aware prior to the award of the BPO contracts that the EPS program faced uncertainties although she was not made aware of the extent of the issues until after award of the BPO contracts. The record is less clear, however, as to the extent to which other agency officials knew prior to the June 24 award of the BPO contracts that the EPS solicitation required cancellation for the reasons identified in the contracting officer's July 10 memorandum. In this regard, it is not clear what FSA leadership and the NextGen program office understood prior to June 24 about the scope of the changes needed for the FSA program and whether these would affect the BPO solicitation.

We need not resolve this question of timing because even if DOE was required to advise offerors of its changed requirements, we find no basis to conclude that the protester here could have been prejudiced by the failure to do so. Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. See *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21-22. Where the record establishes no reasonable possibility of prejudice, we will not sustain a protest even if a defect in the procurement is found. See *Procentrix, Inc.*, B-414629, B-414629.2, Aug. 4, 2017, 2017 CPD ¶ 255 at 11-12.

In protests challenging an agency's failure to amend a solicitation to reflect changes to its requirements, we will not find prejudice where the protester does not establish that the aspect of its proposal that precluded award would have been affected by an amendment of the solicitation. See *Triad Logistics Servs. Corp.*, B-406416, Mar. 19, 2012, 2012 CPD ¶ 118 at 2-3. In *Triad Logistics*, the protester argued that the agency should have amended the solicitation where it knew, prior to award, that delays in the procurement process would result in a shorter period of performance. *Id.* at 2. We

¹² DOE also argues that the BPO solicitation did not require amendment because the RFP anticipated the award of IDIQ contracts that provide for the issuance of orders that could require the use of various agency and contractor solutions, and did not commit solely to the use of EPS. MOL at 23-24; COS at 30-31. For this reason, the agency states that even if it were aware that cancellation of the EPS solicitation was required prior to the award of the BPO contracts, the requirements of the BPO contracts did not change in a manner that required offerors to submit revised proposals. *Id.* Because, as discussed, we conclude that the protester's argument fails because of a lack of competitive prejudice, we need not resolve this aspect of the protester's argument.

concluded that although the change in the period of performance was a material revision to the terms of the solicitation, the protester did not demonstrate that, but for the agency's failure to amend the solicitation, it would have had a substantial chance for award. *Id.* at 3. Specifically, the protester's proposal was not selected for award because it offered a higher unit price as compared to the awardee, and the protester did not assert that it would have reduced its proposed unit pricing in response to the shortened period of performance. *Id.*

Here, we find that the "but for" element of the prejudice standard is not satisfied. Specifically, amendments the protester contends should have been made to the BPO solicitation to reflect the changes to the agency's EPS requirements would not have affected the small business participation factor requirements under which the protester's proposal was found unacceptable.

We agree with the protester that an amendment of the BPO solicitation to reflect the effects of cancelling the EPS solicitation could have required a change to the RFP's performance requirements, and that such a change could in turn have required offerors to submit revised technical proposals. The protester, however, offers nothing more than speculation that a change in the performance requirements would have also required the agency to amend the RFP directions and evaluation criteria for the small business participation factor. See Supp. Comments, Sept. 25, 2020, at 13-15. In this regard, the protester speculates that the agency would likely have lowered the small business participation goals in order to save costs. *Id.* at 14-15. Similarly, the protester speculates that an amendment to the solicitation might have resulted in additional Q&As or directions from the agency that could have resulted in the protester changing its understanding of the small business participation factor requirements. *Id.* at 9. We find that the protester's speculation here does not provide a basis to support its arguments.

Nelnet also states that it would have changed its approach to small business subcontracting if the agency had amended the solicitation to address the changed EPS requirements. See *id.* at 9-12. As discussed above, however, the protester argues that the provisions of the small business participation factor requirements clearly and unambiguously required offerors to submit their small business participation plans and small business subcontracting plans based on goals expressed as a percentage of dollars subcontracted. The protester provides no basis to find that it would have changed its interpretation of the requirements based on an amendment of the BPO solicitation limited to the EPS requirements.

Our Office will resolve any doubts regarding prejudice in favor of the protester because even a reasonable possibility of prejudice forms a sufficient basis to sustain a protest. *Battelle Mem'l Inst.*, B-418047.3, May 18, 2020, 2020 CPD ¶ 176 at 8. Here, however, Nelnet does not show a reasonable possibility that, but for the agency's alleged failure to amend the solicitation's EPS requirement, the protester would have submitted an acceptable small business participation plan. On this record, we find no basis to conclude that, even if the agency was required to amend the solicitation, the protester

could have been prejudiced by the agency's failure to do so. See *Triad Logistics Servs. Corp., supra*.

The protest is denied.

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