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Decision

Matter of: NOVAD Management Consulting, LLC

File: B-419194.5

Date: July 1, 2021

Gunjan R. Talati, Esq., and Jamie C. Lipsitz, Esq., Kilpatrick, Townsend & Stockton, LLP, for the protester.
Julie Cannatti, Esq., Julie Holvik, Esq., Jonathan English, Esq., and Justin Haselden, Esq., Department of Housing and Urban Development, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging solicitation requirement as unduly restrictive of competition is denied where the requirement is reasonably related to the agency's needs.
 2. Protest of solicitation provision is dismissed as untimely piecemeal presentation of protest issues when the alleged problem with the provision was apparent from the face of the solicitation as initially issued, but the provision was not challenged before the date set for receipt of initial proposals.
 3. Protest that terms of solicitation are inconsistent with agency regulations is dismissed because the regulations at issue are not procurement regulations, and the protester does not allege a violation of a procurement statute or regulation.
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DECISION

NOVAD Management Consulting, LLC, of Landover, Maryland, protests the terms of solicitation No. 86614920R00007 issued by the Department of Housing and Urban Development (HUD) for loan support and document management services. The protester alleges the solicitation is unduly restrictive of competition, ambiguous, impermissibly vague, and inconsistent with HUD's regulations.

We deny the protest.

BACKGROUND

On August 27, 2020, the agency issued the solicitation seeking loan servicing support services for HUD's home equity conversion mortgage (HECM) program.¹ Memorandum of Law (MOL) at 3. HECM support services are currently performed by NOVAD under an existing contract that combines HECM services with loan servicing support services for several other programs. *Id.* at 2. As initially issued, the solicitation required contractors to perform within 50 miles of Tulsa, Oklahoma, because the HUD office overseeing the HECM program is located in Tulsa. *Id.* The requirement to perform the contract within 50 miles of Tulsa reflected a change from the terms of the incumbent contract, which provided for performance in Oklahoma City, Oklahoma because the HUD offices overseeing several of the supported loan programs were in Oklahoma City. *Id.* at 4.

NOVAD, one of the incumbent HECM contractors performing from an office in Oklahoma City, filed a protest with our Office challenging the Tulsa geographic restriction as well as several other aspects of the initial solicitation. MOL at 3. The agency took voluntary corrective action, and amended the solicitation. *Id.* NOVAD again filed a protest of the terms of the solicitation on similar grounds to its initial protest, and the agency again took voluntary corrective action, and again amended the solicitation. *Id.*

Among other changes, the amended solicitation no longer requires contractors to perform within 50 miles of Tulsa, Oklahoma, but, instead, establishes that offerors proposing to perform in Tulsa will receive a strength in their technical evaluation. Agency Report (AR), Tab 32, Request for Proposals (RFP) at 157.

Additionally, the solicitation includes several contract line item numbers (CLINs) for different services. *See id.* at 2. Relevant to this protest, the RFP includes a fixed price CLIN for transition-in services, but provides "[t]ransition-[i]n is not required if the successor [c]ontractor is the incumbent [c]ontractor." *Id.* at 15. The RFP also includes a separate CLIN for reimbursable items, which include office setup and certain moving expenses. *Id.* at 2-3. The RFP did not direct offerors to price the reimbursable CLIN, but rather provided a not-to-exceed amount for the CLIN. *Id.* at 3.

Finally, the RFP provides specific procedures for contractors to use when servicing HECM loans. For example, the RFP notes the contractor should call certain mortgage loans due and payable when, among other things, the mortgagor fails to perform its obligations under the mortgage, such as failing to pay required property charges. RFP at 39. This solicitation requirement applies only to mortgages issued prior to 2017, and

¹ Home equity conversion mortgages, sometimes called "reverse mortgages," are mortgages where eligible homeowners can elect to convert the equity in their homes into liquid assets. MOL at 3.

is based on language that previously existed in HUD's regulations.² *Id.* at 5-6. Additionally, the RFP also requires the loan servicer to make property charge payments on behalf of the mortgagor under certain circumstances. Specifically, if the mortgagor has failed to make property charge payment prior to the penalty date,³ the contractor must make the payment on behalf of the mortgagor within 30 days to protect HUD's security interest. RFP at 39. However, the RFP also provides any penalties or interest incurred for non-payment more than 30 days after the penalty date will be at the contractor's expense. *Id.*

DISCUSSION

The protester raises four challenges to the solicitation. First, the protester contends the solicitation's assignment of a strength to contractors performing within 50 miles of Tulsa, Oklahoma, is unduly restrictive of competition. Protest at 11-13. Second, the protester argues the transition-in provisions of the solicitation are ambiguous with respect to the incumbent. *Id.* at 13-15. Third, NOVAD alleges the solicitation's property charge provisions are inconsistent with HUD's regulations. *Id.* at 15-17. Fourth, and finally, the protester maintains the property charge provisions are impermissibly vague thereby imposing unknown risk on the contractors. *Id.* at 17-18. We address these arguments in turn.

Geographic Evaluation Factor

First, the protester argues awarding a strength for performance of services within 50 miles of Tulsa is unduly restrictive of competition because it is not reasonably related to the agency's needs. Protest at 11-13. In this regard, the protester contends the loan services can be performed from any location, and, indeed, the protester has been performing them as the incumbent contractor from Oklahoma City, Oklahoma, for the last several years. Comments at 8-10. Accordingly, the protester alleges this solicitation provision is arbitrary and does not reflect the agency's actual needs.⁴ *Id.*

² The relevant requirements in HUD's regulations have since changed for new mortgages, but the agency explains that the older requirements still apply to older mortgages because they were incorporated into the terms of those mortgage agreements. MOL at 5-6; Federal Housing Administration: Strengthening the Home Equity Conversion Mortgage Program, 82 Fed. Reg. 7094 (Jan. 19, 2017).

³ The solicitation defines the "penalty date" as "[t]he last date upon which property charges can be paid without any financial penalty being assessed." RFP at 18

⁴ Collaterally, the agency argues the protester is not an interested party to assert this protest ground because [DELETED]. MOL at 9-10. Our decisions have concluded a prospective offeror generally lacks standing to challenge a specification as unduly restrictive in cases where it can meet the requirement set forth in the solicitation, as such a challenge would be, in essence, on behalf of other potential suppliers who are economically affected by the specification's allegedly restrictive nature. *Westinghouse*

The determination of the government's needs and the best method of accommodating them is primarily the responsibility of the procuring agency. *Columbia Imaging, Inc.*, B-286772.2, B-287363, Apr. 13, 2001, 2001 CPD ¶ 78 at 2. Our Office will not sustain a protest challenging an agency's determination of its needs unless the protester presents clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. *Instrument Control Services, Inc.*; *Science & Management Resources, Inc.*, B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66 at 6. To the extent a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the requirement as well as the agency's need for the restriction, the procuring agency has the responsibility of establishing the specification is reasonably necessary to meet its needs. *Smith and Nephew, Inc.*, B-410453, Jan. 2, 2015, 2015 CPD ¶ 90 at 5. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether it can withstand logical scrutiny. *Id.*

In this regard, the agency prepared a memorandum documenting its rationale for including a strength for performance within 50 miles of Tulsa. See AR, Tab 31, HECM Place of Performance Memorandum. The memorandum noted, among other things, that while HECM loan servicing had previously been performed in Oklahoma City, there were documented, ongoing performance problems under the incumbent HECM contract. *Id.* at 1-2. Specifically, the agency points out that the protester, who is an HECM incumbent contractor, has received unsatisfactory ratings on eight separate

Elec. Corp., B-224449, Oct. 27, 1986, 86-2 CPD ¶ 479 at 3; see also *American Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503. However, we have also concluded a protester that can meet a restrictive requirement may be an interested party to challenge it in certain circumstances where the protester can identify specific competitive harms stemming from the protester's unique market position. See, e.g., *J. Squared Inc., d/b/a University Loft Co.*, B-408388, Aug. 27, 2013, 2013 CPD ¶ 201 at 4 (protester is an interested party where agency restricted procurement to oak constructed furniture, when the firm could compete more effectively if permitted to offer furniture constructed of another type of wood it routinely offered for sale); *Gould, Inc.*, B-224365, Oct. 17, 1986, 86-2 CPD ¶ 464 (prospective offeror is an interested party where, despite being able to meet the solicitation's terms, the firm is an established manufacturer of an item excluded by a restrictive specification).

While the protester acknowledges it [DELETED] is capable of meeting the requirement, the protester also notes it has an existing fully equipped office in Oklahoma City, Oklahoma. Comments at 13. The protester contends it could compete more effectively by proposing to perform with its existing facilities and infrastructure rather than [DELETED]. *Id.* That is to say, working from the protester's existing offices could permit the protester to propose either a technically superior proposal (e.g. due to reduced transition risk) or a lower overall price or both. *Id.* On these facts, we conclude the protester is an interested party to challenge the restriction.

contractor performance assessment reports (CPARs) since 2017. MOL at 11. For example, the CPAR evaluation for October 2018 through February 2019 explained NOVAD had failed to monitor and remediate delinquent tax payments on more than 2,000 loans leading to the loss of at least 54 properties to tax sales. AR, Tab 30, CPARs for October 2018 to Oct. 2020 at 3.

As a result, the agency seeks to exercise greater oversight of the future HECM contractor, and the agency office overseeing the HECM program is located in Tulsa. See AR, Tab 31, HECM Place of Performance Memorandum at 1-2. Accordingly, the agency concluded an offeror willing to perform within 50 miles of Tulsa would be advantageous to the agency because having the contractor nearby would facilitate agency oversight. *Id.*

In response, the protester disputes the agency's characterization of its performance under the incumbent contract,⁵ and claims the alleged failures to pay property taxes under the incumbent contract would not have been remedied by more frequent site visits. Comments at 9-10. Additionally, the protester argues there is a disconnect between the issue areas cited in the agency's memorandum (maintenance of collateral loan documents and monitoring of incoming borrower payments), and the alleged performance issues identified on the incumbent effort (failing to pay property taxes in a timely fashion). *Id.* Finally, the protester contends this solicitation provision has nothing to do with the substantive performance of the contract, and instead serves no purpose but the agency's administrative convenience. *Id.* at 11 (*citing Economy Linen & Towel Serv. of Zanesville, Inc.*, B-229806, Mar. 2, 1988, 88-1 CPD ¶ 222)

On the record before us, we see no reason to conclude the agency's preference for performance near Tulsa is in any way unreasonable. While the memorandum identifies certain areas of oversight the agency would like to improve, but does not mention others, the agency is not required to document every possible reason for seeking to increase its oversight of this effort. Moreover, the CPARs document a variety of significant, longstanding performance problems that the agency is seeking to prevent from occurring in the future. Given the enormous risk of loss the agency faces from poor contract performance, it is reasonable for the agency to seek to increase its oversight and monitoring of this program by offering a strength for contractors willing to perform closer to the program office.

Moreover, the protester's allegation that this requirement only serves the agency's administrative convenience misunderstands the agency's concerns. While performance near Tulsa would certainly make it easier for the agency to perform oversight, the agency makes clear that it would also, given a finite travel budget, permit the agency to conduct more frequent site visits. MOL at 12-13. We see nothing unreasonable about the agency offering a strength to offerors willing to perform closer to the program office in this case.

⁵ There is ongoing litigation concerning disputes between the agency and the protester under the incumbent contract at the Court of Federal Claims. See MOL at 19.

Transition-In Provisions

The protester contends the transition-in provisions are vague or ambiguous with respect to incumbent offerors. Protest at 12-15. Specifically, the protester notes the solicitation provides that transition-in services are permitted, but not required if the offeror is the incumbent. *Id.* However, the solicitation also contemplates reimbursement to contractors for certain transition-related categories of costs, such as relocation costs. *Id.* The protester asserts it is uncertain whether it, as the incumbent, will be permitted to seek reimbursement for relocation or other related costs. *Id.*

This protest argument is untimely. Our Regulations provide that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. 4 C.F.R. § 21.2. Additionally, our Regulations do not contemplate the piecemeal presentation or development of protest issues; when a protester raises a broad ground of protest in its initial submission but fails to provide details within its knowledge until later, so that a further response from the agency would be needed to adequately review the matter, these later issues will not be considered. *CapRock Gov't Solutions, Inc. et al., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 24.*

In this case, the protester does not dispute the relevant solicitation provisions concerning the transition were present in the original solicitation and have not been altered in the subsequent amendments. See Comments at 18-19. Moreover, this is the third protest of this solicitation NOVAD has filed with our Office, but NOVAD did not raise this issue in either of its prior protests.

NOVAD argues this does not represent piecemeal presentation because the transition-in provisions were not ambiguous in the original solicitation, but only became so after the solicitation was amended. *Id.* NOVAD notes the original solicitation required all offerors to perform within 50 miles of Tulsa, Oklahoma. *Id.* However, in the protester's view, once the solicitation was amended such that performance within 50 miles of Tulsa was merely a strength, and not a requirement, the transition-in provisions became ambiguous because offerors could now elect whether to relocate. *Id.*

We are unpersuaded by the protester's argument. To the extent the transition-in provisions are ambiguous, which is not clear,⁶ their ambiguity was not meaningfully affected by the change in the geographic restrictions of the solicitation. That is to say, regardless of whether offerors were required to perform near Tulsa, or were merely

⁶ We note, in passing, that the provision indicating incumbent offerors need not perform transition-in services appears to be referring to the fixed-price CLIN for transition in services. RFP at 15. By contrast, the solicitation provisions discussing the reimbursable CLIN includes no similar language, and does not appear to limit which offerors may seek reimbursement for relocation expenses. See RFP at 2-3.

offered a strength for doing so, it would be equally unclear whether an offeror would be reimbursed for relocation expenses under the protester's reading of the solicitation.

In either case, an incumbent offeror must choose whether to compete for the requirement, and if so, how to price the fixed-price portions of its proposal; both decisions would clearly be affected by the allegedly ambiguous solicitation terms. The fact that, after the amendment, the protester faced an additional decision concerning whether to relocate does not render the existing transition-in provisions newly ambiguous. Accordingly, this protest ground should have been raised prior to the initial time for receipt of proposals and represents an improper piecemeal presentation of protest issues.

Property Charge Provisions

The protester raises two arguments concerning the property charge provisions of the solicitation.⁷ First, the protester contends the property charge provisions are inconsistent with HUD's HECM regulations at 24 C.F.R. §§ 206.1-206.211. Protest at 15-17. Second, the protester argues the solicitation provisions governing the payment of property charges are vague and ambiguous in a way that prevents offerors from intelligently preparing their proposals. Protest at 17-18.

Concerning the protester's argument that the solicitation is inconsistent with HUD's regulations, we conclude that this allegation does not allege a violation of a procurement law or regulation. Our Office is authorized to decide bid protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552(a). Although protests usually involve alleged violations of statutes that are indisputably procurement statutes, such as the Competition in Contracting Act, we will hear protests alleging violations of other statutes or regulations when those statutes or regulations have specific procurement-related provisions. See, e.g., *Stone Hill Park, LLC*, B-414555.4, July 18, 2017, 2017 CPD ¶ 226 at 1 (addressing provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207); *Caddell Constr. Co., Inc.*, B-411005.1, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 1 (addressing provisions of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852); *Crane & Co., Inc.*, B-297398, Jan. 18, 2006, 2006 CPD ¶ 22 at 1 (addressing provisions of statute concerning currency paper procurement, 31 U.S.C. § 5114(c)); cf. *Alliant Enterprise JV, LLC*, B-410352.5, B-410352.6, July 1, 2015, 2015 CPD ¶ 209 at 5 n.8 (dismissing allegation of a violation of the voluntary services prohibition and, in turn, the Antideficiency Act because the Antideficiency Act is

⁷ The agency contends these arguments are also an untimely piecemeal presentation of issues because the protester did not raise them in its September 28, 2020, protest of this solicitation, but rather only raised them in a supplemental protest filed three days later. MOL at 9. We note, however, that the protester's supplemental protest was still filed prior to the initial time set for receipt of proposals. That is to say, these arguments independently satisfied our timeliness requirements and are not untimely. See *Epsilon Sys. Solutions, Inc.*, B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230, at 11.

not a procurement statute); *Sam Gonzales, Inc.--Recon.*, B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306 at 2 (provision of the Bankruptcy Act prohibiting discrimination against debtors did not bear directly on a federal agency procurement for purposes of determining jurisdiction, although GAO issued a decision on the merits at the request of the agency and the Bankruptcy Court).

While the protester contends the facts in this case are similar to the facts in our decision in *Merck & Company, Inc.*, B-295888, May 13, 2005, 2005 CPD ¶ 98, we do not agree. In that decision, we concluded a statute establishing a process for an agency to make formulary decisions concerning which pharmaceutical agents to make available to beneficiaries was a procurement statute because agency decisions made under the statute would lead directly to the purchase of pharmaceutical agents using the Federal Supply Schedules. *Merck & Company, Inc.*, *supra* at 8. That is to say, we concluded the statute was a procurement statute because decisions made under the relevant statutory provisions would effectively decide future procurements of goods by federal agencies. *Id.*

In this case, by contrast, the regulations at issue principally govern HUD's HECM program and acceptable practices for HECM mortgage servicers. See, e.g., 24 C.F.R. §§ 206.201-206.205. While these regulations substantively relate to the performance of the services being procured in this case, the relevant regulations do not contain procurement-related provisions or otherwise dictate how the agency may seek to procure mortgage servicing support services. *Id.* The protester has articulated no nexus between the HECM regulations and the process for procuring goods or services by federal agencies. Accordingly, this protest ground is dismissed because it does not allege a violation of a procurement law or regulation.

Turning to the protester's second argument concerning the property charge provisions, the protester contends the solicitation is impermissibly vague. Protest at 17-18. The protester contends the solicitation imposes an unknown and unknowable liability on offerors because the contractor must, under certain circumstances, make property charge related payments at their own expense. *Id.* Because the agency has provided no information that would permit an offeror to estimate the magnitude of such liability, the protester argues this provision imposes excessive risks on a contractor. *Id.*

As a general rule, a solicitation must be drafted in a fashion that enables offerors to intelligently prepare their proposals and must be sufficiently free from ambiguity so that offerors may compete on a common basis. *Raymond Express Int'l*, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317 at 9. However, there is no requirement that a competition be based on specifications drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective offeror; to the contrary, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, provided the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. *Phoenix Environmental Design, Inc.*, B-411746, Oct. 14, 2015, 2015 CPD ¶ 319 at 3.

Preliminarily, the protester misrepresents the solicitation's requirements. The solicitation provides when the mortgagor has not made a property charge payment by the penalty date, the contractor should make the property charge payment on behalf of the mortgagor within 30 days and then, going forward, future payments should be made prior to the penalty date. RFP at 38-39. However, the solicitation does not require contractors to make those payments at their own expense. *Id.*; see also MOL at 20 (explaining timely payments made on behalf of borrowers can be charged to the loan or reimbursed by the agency). Rather it is only in those cases where the contractor fails to make payments by the timelines established in the solicitation that the contractor must then pay penalties and interest at its own expense. *Id.* at 38-39, 51.

We do not agree these provisions impose an indefinite or inappropriate risk on the contractor. The solicitation only imposes costs on the contractor if the mortgagor fails to make a timely payment and the contractor fails to detect and remedy that late payment within the timelines provided in the solicitation. That is to say, while the number of mortgagors who fail to make timely payments is an unknown risk, the contractor may avoid any liability for that risk by detecting the late payment and ensuring it is paid prior to the timelines provided in the solicitation. Indeed, the solicitation specifically requires the contractor to perform loan monitoring and take action within specific timelines--the provisions to which the protester objects appear to be nothing more than an incentive for contractors to efficiently discharge those responsibilities. See RFP at 38-39. The only risk the agency appears to be imposing on the contractor is the risk of the contractor's own poor performance. Accordingly, we see no reason to conclude this provision inappropriately shifts risks from the government to the contractor.

The protest is denied.

Thomas H. Armstrong
General Counsel