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Decision

Matter of: AttainX, Inc.

File: B-419306; B-419306.2

Date: January 12, 2021

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DIGEST

Protest that agency unreasonably eliminated quotation from consideration for award because protester proposed the same key personnel in its quotation submitted in response to a related solicitation, for which it received an award, is denied where solicitation for which protester's quotation was eliminated specifically prohibited vendors from offering the same key personnel under both solicitations.

DECISION

AttainX, Inc., a small business of Herndon, Virginia, protests the award of a contract to B&B Solutions, a small business of Washington, D.C., under request for quotations (RFQ) No. 12314420Q0042 (RFQ 0042), which was issued by the United States Department of Agriculture (USDA) for investigative support services. AttainX complains that its quotation was unreasonably eliminated from the competition because it proposed the same key personnel for RFQ 0042, as well as a separate solicitation for which it received an award.

We deny the protest.

BACKGROUND

The agency issued RFQ 0042 on June 19, 2020, as a set-aside under the Small Business Administration's 8(a) business development program for legal investigative services for the Office of the Assistant Secretary for Civil Rights (OASCR). Resp. to Req. for Documents, Doc. 2, RFQ 0042 at 1, 4. Specifically, the solicitation sought vendors to review investigative plans, obtain information (including statistics and testimony), update the complaint system, prepare the investigative file, and distribute

the review of investigations. *Id.* at 4. On June 18, the agency issued a related solicitation, RFQ No. 12314420Q0049 (RFQ 0049), for support services to review the investigative file, draft the final agency decisions, and prepare complaint status memoranda. *Id.*, Doc. 6, RFQ 0049 at 1, 4.

RFQ 0042 contemplated a best-value tradeoff basis for award, based on an evaluation of price and the following non-price factors: technical approach; key personnel; and past performance. RFQ 0042 at 35. Relevant to this protest, the solicitation identified two key personnel--the program manager, and the on-site lead equal opportunity specialist--that were "considered essential to the work being performed under this contract." *Id.* at 7. RFQ 0049 identified the same key personnel categories as required and essential for performance. RFQ 0049 at 7. With respect to the key personnel factor, RFQ 0042 stated that the agency would evaluate personnel on the minimum requirements set forth in the solicitation. RFQ 0042 at 55.

On July 28, the agency issued amendment No. 1 to RFQ 0042, which responded to vendors' questions. Agency Response to GAO Question, Dec. 4, attach. 1, System for Award Management Posting at 4. The following two questions and responses with respect to RFQ 0042 are relevant to this protest:

Question: Is there a minimum time requirement for on-site-work for the Program Manager, Lead Person . . . ? What percentage of work can be telework?

Response: On site is required 4 out of 5 days a week.

* * * * *

Question: What is the relationship between [RFQ 0042], OASCR Support Services and [RFQ 0049], Final Agency Determination? Are there current contract vehicles in place for both efforts? If so, are there incumbents in place for both contracts? Were the contracts awarded to the same incumbent? Is it permissible for a bidder to submit proposals for both? Is it permissible to reference the same past performances for each? Is it permissible to specify some of the same personnel for both?

Response: 1. The relationship between the two RFQ[s] is that the first RFQ deals with . . . review[ing] investigations [of] the issues and the 2nd RFQ uses the ROI's [Review of Investigation's] that have been produced to draft the Final Agency Decisions (FADs) 2. Yes. 3. Yes. 4. Yes. 5. No. 6. No.

Resp. to Req. for Documents, Doc. 3, RFQ 0042, Questions & Responses at 2, 25.

The agency received three quotations for RFQ 0042 by the August 4 due date, including the quotations from AttainX and B&B. Contracting Officer's Statement (COS) at 1. The agency evaluated the quotations and determined they each met all of the solicitation's

technical requirements. *Id.* However, before the quotations were evaluated for price, the agency learned that AttainX had proposed the same two key personnel in its responses to RFQ 0042 and RFQ 0049. *Id.* On September 9, the agency sent a request to AttainX for clarification of key personnel concerning RFQ 0042 and RFQ 0049. The clarification question and the AttainX's response are as follows:

Key Personnel-Clarify how [AttainX] will meet contract requirements for [RFQ 0049] since the same Key Personnel [were] proposed for [RFQ 0042].

Response: Both above referred solicitations have different solicitation numbers and therefore two different procurements. AttainX considered both solicitations as two independent procurements. Our proposed key personnel have the required qualification to meet the requirements for both the solicitations. We therefore did not want to deprive this individual's right to represent in both the solicitations. We also did not see any instructions in the solicitations that restrict use of the same resumes in both the responses. However, in the event that AttainX is the awardee for both the solicitations, we will then work with the Government to replace this resource with an equally qualified resource or someone who meets or exceeds the requirements of the RFP. Please note that this will occur only with prior written notification and approval by the Contracting officer, which is in line with the Key Personnel requirement in the solicitation.

Req. for Dismissal, attach. 3, AttainX Response.

On September 18, AttainX was awarded the contract under RFQ 0049. Protest at 10. On September 22, before the contracting officer sent the quotations received in response to RFQ 0042 to the price evaluation panel for review, the panel was informed that AttainX was no longer eligible for award. COS at 1. On September 29, the agency awarded the contract under RFQ 0042 to B&B. *Id.* at 2. AttainX subsequently submitted its protest to our Office.

DISCUSSION

Attain X protests that the agency improperly eliminated the quotation it submitted in response to RFQ 0042 from consideration for award because AttainX proposed the same key employees for RFQ 0042 and RFQ 0049. AttainX argues that the agency used undisclosed evaluation criteria to eliminate its quotation because the solicitation did not prohibit vendors from proposing the same employees for both solicitations or require that the key personnel be dedicated full-time to either contract.¹ Protest

¹ AttainX states that it is the incumbent contractor where it performs--by utilizing the same employees--all of the work encompassed by RFQ 0042 and RFQ 0049. Protest

at 11-14; Comments at 1. AttainX argues that performance on one contract would not necessarily render such staff unavailable to perform on the other. Comments at 1. AttainX also argues that it was improper for the agency to eliminate its quotation from consideration under RFQ 0042 based on information that was in the quotation it submitted in response to RFQ 0049.² Protest at 14.

The agency responds that once AttainX received the award for RFQ 0049, the key personnel it proposed for both solicitations were no longer available to perform the requirements of RFQ 0042. Req. for Dismissal at 2. The agency states that because the agency could not evaluate AttainX's key personnel under RFQ 0042, since they were unavailable, the AttainX quotation was rendered unacceptable. *Id.*

As noted, AttainX argues that the solicitation itself, as initially issued, did not prohibit vendors from proposing the same key personnel for both solicitations. Amendment 1 to RFQ 0042, however, advised vendors that the same personnel could not be proposed for both solicitations. AttainX does not dispute that in response to the question of whether it was permissible to specify some of the same personnel for both efforts the agency replied no.³ Comments at 5. Instead, AttainX asserts that this prohibition

at 2. AttainX explains that the agency had decided to split the work into two procurements. *Id.* at 2.

² AttainX also raises collateral arguments. While we do not address each argument, we have considered all of them and find that none provide a basis to sustain the protest. For example, AttainX argues that the solicitation permits replacement of key personnel as long as the individuals meet the minimum qualifications specified for the key position. Comments at 4-5 (*quoting* RFQ 0042 at 7). AttainX argues this replacement of personnel may occur prior to performance. However, the part of the solicitation cited by the protester--which refers to the contractor removing or replacing personnel--must be read in conjunction with other parts of the solicitation. Here, the solicitation also included Agriculture Acquisition Regulation clause 452.237-74, Key Personnel, which states that the key personnel assigned to the contract are the project manager and onsite lead. RFQ 0042 at 20. That clause further states that during the first 90 days of performance "the Contractor shall make no substitutions of key personnel unless necessitated by illness, death, or termination of employment." *Id.*

³ We note for the record that Amendment 1 to RFQ 0042 contains seven questions and only six answers. The annotated quotation below sets out our interpretation of the amendment:

Question: [1] What is the relationship between [RFQ 0042], OASCR Support Services and [RFQ 0049], Final Agency Determination? [2] Are there current contract vehicles in place for both efforts? [3] If so, are there incumbents in place for both contracts? [4] Were the contracts awarded to the same incumbent? [5] Is it permissible for a bidder to submit proposals for both? [6] Is

applied to personnel other than key personnel, especially in light of the fact that the program manager and on-site lead do not have a case load. *Id.* Given that the agency response did not distinguish between key personnel and other personnel we see no support in the record for AttainX's interpretation.

Likewise, AttainX asserts that there was no requirement that the proposed key personnel work full-time on each contract. Amendment 1 to RFQ 0042 advised vendors that key personnel were required to be on site 4 to 5 days per week. AttainX interprets this as the agency's acknowledgment that key personnel could be available less than full time. We disagree. First, the question did not ask whether key personnel proposed for RFQ 0042 would be permitted to work part-time or full-time. Instead, the question inquired about whether the key personnel were required to be on site. Moreover, the record contains evidence suggesting that AttainX understood the agency intended that the key personnel be full-time employees. Specifically, when the agency asked AttainX how it would be able to meet the contract requirements for RFQ 0049 since the same key personnel were proposed for RFQ 0042, AttainX responded that if awarded both efforts, it would work with the government to replace the personnel resources with equally qualified key personnel. Req. for Dismissal, attach. 3, AttainX Response.

Given that AttainX ignored amendment 1 which informed vendors that the same key personnel could not be proposed for both RFQs, the agency properly eliminated AttainX's quotation under RFQ 0042 once AttainX was awarded the contract under RFQ

it permissible to reference the same past performances for each?
[7] Is it permissible to specify some of the same personnel for both?

Response: 1. The relationship between the two RFQ[s] is that the first RFQ deals with . . . review[ing] investigations [of] the issues and the 2nd RFQ uses the ROI's that have been produced to draft the Final Agency Decisions (FADs). 2. Yes. 3. Yes. 4. Yes. 5. No. 6. No.

Resp. to Req. for Documents, Doc. 3, RFQ 0042, Questions & Responses at 25. We also recognize that it is not clear whether the agency intended to respond "no" to the last question, which states: "Is it permissible to specify some of the same personnel for both?" However, AttainX has not raised this as an issue and acknowledges that the agency responded "no" to this question. Comments at 5 ("In a compound question, an offeror inquired whether it was 'permissible to specify some of the same personnel for both?' [] USDA responded curtly, 'No.'"). Moreover, the agency's response to question 5 is also "no." The question states: "Is it permissible for a bidder to submit proposals for both [solicitations]?" Accordingly, if we read the questions and answers as provided, AttainX was not permitted to submit quotations in response to both solicitations.

0049.⁴ Finally, since the solicitation specifically prohibited vendors from proposing the same personnel for both solicitations, AttainX was on notice that the agency would consider whether vendors proposed the same key personnel for both. Accordingly, there was nothing improper in the agency eliminating AttainX's quotation under RFQ 0042 based on the key personnel AttainX proposed under RFQ 0049.

AttainX also protests that the agency improperly evaluated B&B's price and that the agency should have determined that B&B is not a responsible small business concern. AttainX is not an interested party to raise these issues.

Our Bid Protest Regulations define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it could not be considered for an award if its protest were sustained. *Yoosung T&S, Ltd.*, B-291407, Nov. 15, 2002, 2002 CPD ¶ 204 at 4. Here, AttainX is not eligible for award under RFQ 0042, and therefore is not interested to raise these issues.⁵

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ Notably, AttainX was required to inform the agency when the key personnel it proposed to perform on RFQ 0042 became unavailable for that award. See *M. C. Dean, Inc.*, B-418553, B-418553.2, June 15, 2020, 2020 CPD ¶ 206 at 4. Our Office has explained that offerors or vendors are obligated to advise agencies of material changes in proposed staffing, even after submission of proposals. See *General Revenue Corp. et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106 at 22.

⁵ We also note that our Office does not consider protests challenging an agency's affirmative determination of responsibility. 4 C.F.R. § 21.5(c).