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Decision

Matter of: AIMS Locum Tenens, LLC

File: B-419723

Date: July 13, 2021

Johnathan Bailey, Esq., and Kristin Zachman, Esq., Bailey & Bailey, P.C., for the protester.
Major Nicholas A. Lucchetti, and Captain Ethan S. Chae, Department of the Army, for the agency.
Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision..

DIGEST

1. Protest challenges regarding ambiguities in the solicitation are untimely because any ambiguities were patent and were not challenged prior to the due date for receipt of proposals.
 2. Protest challenging the agency's evaluation of proposal as technically unacceptable is denied where the record shows that the agency's evaluation was reasonable and consistent with the solicitation's terms.
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DECISION

AIMS Locum Tenens, LLC, an 8(a) small business of Pikesville, Maryland, protests the evaluation of its proposal as technically unacceptable under request for proposals (RFP) No. W81K00-21-R-3005, issued by the Department of the Army to provide emergency medicine physician services at Evans Army Community Hospital, Emergency Department, Fort Carson, Colorado.¹ The protester challenges the agency's evaluation of its proposed compensation plan.

We deny the protest.

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) program.

BACKGROUND

The solicitation was issued on November 12, 2020, pursuant to FAR parts 12 and 15, as a set-aside for 8(a) firms. Agency Report (AR), Tab 3, RFP at 1. The RFP contemplated the award of a fixed-price contract for a base year and four 1-year option periods. *Id.* at 83. Award was to be made on a best-value tradeoff basis, considering the evaluation factors of past performance, compensation plan, and price.² *Id.* at 86.

The RFP contemplated a phased approach to the evaluation of proposals where proposals had to be successfully evaluated under each phase in order to be considered in the next phase. *Id.* at 87. Proposals were evaluated first for past performance, and then compensation plan, and finally, price. *Id.*

The solicitation instructed that proposals be prepared in a number of separate volumes including, administrative, past performance, compensation plan, and pricing. *Id.* at 75. As to an offeror's compensation plan, the solicitation instructed, as follows:

Compensation Plan: Offerors shall include a total employee compensation plan for the base period and each option period indicating the hourly rate. A sample compensation plan worksheet is included at Attachment 3. NOTE: For Personal Services Contracts, Total compensation for health care providers shall not exceed either \$400,000 per year (to include bonuses and incentives) or the Full Time Equivalent Rate (FTER) of \$208.33 based on Title 10 U.S.C. Section 1091.

Id. at 76 (emphasis omitted). Relevant here, the solicitation also included the following warning regarding the compensation to be paid to emergency medical physicians under this contract:

In no case shall the total amount of compensation paid to an individual in any year under a Personal Services Contract exceed the full time equivalent rate of \$400,000.00 or \$208.33/hour, as established under Section 102 of title 3, chapter 2, United States Code. The number of hours one employee can work on a full-time schedule is 1,920 (\$400,000/1,920 hours = \$208.33/hour).

Id. at 39.

As stated above, and of particular importance to this protest, the solicitation contained a sample compensation plan worksheet, entitled Total Employee Compensation, which was included as attachment 3. *Id.*; AR, Tab 5, Attachment 3-Total Employee Compensation. This document was a blank worksheet where offerors could include their proposed labor rates, for the base period and each option period. Of note, the

² The solicitation stated that past performance was significantly more important than the compensation plan and price. *Id.* at 86.

worksheet included rows for offerors to insert hourly rates for various fringe benefits “if applicable,” such as sick leave, vacation hours, and health insurance. *Id.* At the bottom of each column for each time period, the worksheet stated, “Total Employee Hourly Compensation (Base + Fringe).” *Id.* In this respect, the worksheet was structured so that offerors would add the base labor rate to the total employee fringe benefit hourly rate to calculate the total employee hourly compensation.

The RFP provided the following regarding the evaluation of an offeror’s compensation plan:

The proposed compensation plan will be considered in terms of its impact upon recruitment and retention and its consistency with a total plan for compensation that is sufficient to attract and retain quality Health Care Providers (HCPs). This factor will be rated as either “acceptable” or “unacceptable.”

Any offer that receives a rating of “unacceptable” will be ineligible for award. Any compensation plan that is incomplete, does not show the breakdown of fringe benefits (or explanation if hiring independent contractors), or is not submitted with amounts as hourly (not annual) rates will be rated “unacceptable.”

Id. at 88-89.

Prior to the December 15 due date, the agency received 15 proposals, including proposals from AIMS and Nationwide. Contracting Officer’s Statement at 2. AIMS’s proposal included a statement that the total compensation for its proposed health care providers shall not exceed either \$400,000 per year (to include bonuses and incentives) or the full-time equivalent rate of \$208.33. AR, Tab 11, AIMS Proposal Vol. III, Compensation Plan at 3. In addition to this affirmation, AIMS’s proposal included a spreadsheet containing its compensation plan, following the format set forth in the worksheet provided as attachment 3. In this spreadsheet, AIMS proposed a direct labor hourly rate of \$[DELETED], and a total employee fringe benefits rate of \$[DELETED] per hour, resulting in a total hourly compensation rate (base plus fringe) of \$257.08. *Id.*

During its evaluation, the agency found AIMS’s proposal unacceptable because its compensation plan proposed total hourly compensation rates of \$257.08, which exceeded the total compensation limit of \$208.33, as set forth in the solicitation. AR, Tab 12, Compensation Plan Evaluation at 3. On March 18, 2021, the agency notified AIMS it was awarding the contract to Nationwide Healthcare Solutions, LLC, an 8(a) small business of Honolulu, Hawaii, based on a total evaluated price of \$12,614,684.16. AR, Tab 14, Notice to Unsuccessful Offeror at 1. This notice also informed AIMS of the agency’s conclusion that its compensation plan was technically unacceptable. This protest to our Office followed.

DISCUSSION

AIMS contends that the agency unreasonably concluded that its compensation plan exceeded the allowable compensation limits set forth in the solicitation. Specifically, the

protester argues that “AIMS considered the measure of compliance with the stated compensation cap to be the base labor rate, to the exclusion of fringe benefits.” Protest at 5. The protester asserts that “[s]ince the listed fringe benefits do not represent bonuses or incentive pay as they are generally understood, that conclusion is entirely unreasonable.” *Id.* AIMS goes on to state that to the extent the agency “sought to impose a lower cap, or perhaps erroneously considered fringe benefits to be an element (‘bonuses and incentives’) of total annual compensation for purposes of determining compliance with the cap, or both, the [s]olicitation itself is defective.” *Id.* The protester also contends that the solicitation’s established compensation cap is not sufficient to recruit and retain adequate providers given that it anticipates “‘total compensation’ (inclusive of fringe benefits) at \$208.33 per hour.”³ *Id.*

The agency responds that its evaluation of AIMS’s compensation plan was reasonable and consistent with the terms of the solicitation. In this regard, the agency contends that it reasonably concluded that AIMS’s proposed total hourly compensation rate of \$258.07 exceeded the established total hourly compensation cap of \$208.33, as set forth in the solicitation.

Additionally, the agency contends that AIMS’s arguments concerning the agency’s evaluation of its compensation plan, at their core, amount to an untimely challenge to the terms of the solicitation. Memorandum of Law (MOL) at 12. According to the agency, to the extent the protester believed that the solicitation was in error or ambiguous as to what hourly rates were encompassed in the total compensation cap, its proper recourse was to file a timely protest contesting the terms of the RFP before the receipt of proposals. MOL at 11-12 *citing* 4 C.F.R. § 21.2(a)(1).

The agency maintains that while AIMS selects certain language from the RFP as evidence of its belief that the compensation cap in the solicitation was only limited to the base labor rate--*i.e.*, to the exclusion of hourly fringe benefit rates--the solicitation clearly established a cap on the “total amount of compensation paid to an individual.” MOL *quoting* RFP at 39. To support this contention, the agency points out that attachment 3 of the RFP further clarified that the solicitation intended that hourly fringe benefits rates were to be part of the base compensation rate by stating, “Total Employee Hourly Compensation (Base + Fringe).” MOL *quoting* AR, Tab 5, Attachment 3-Total Employee Compensation.

For the reasons discussed below, we agree with the agency both that the evaluation of AIMS’s proposed compensation plan was reasonable and consistent with the solicitation, and that the protester’s arguments against the agency’s interpretation of the RFP’s total compensation cap amount to an untimely challenge to the solicitation. As an initial matter, we first address whether the solicitation was ambiguous with regard to whether fringe benefits would be included for purposes of the total compensation cap.

³ AIMS has presented arguments that are in addition to, or variations of, those discussed above. We have considered all of the protester’s contentions and find no basis to sustain the protest.

Where a protester and the agency disagree about the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. Where a protester and an agency disagree over the meaning of solicitation language, we will resolve the matter by assessing whether each posited interpretation is reasonable. *Anders Constr., Inc.*, B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 3.

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Argus Int'l Risk Servs., LLC*, B-411682, B-411682.2, Sept. 25, 2015, 2015 CPD ¶ 303 at 5. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Planned Sys. Int'l, Inc.*, B-413028.5, Feb. 21, 2018, 2018 CPD ¶ 126 at 6. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. Where a patent ambiguity is not challenged prior to submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10; *see also PricewaterhouseCoopers Public Sector, LLP*, B-413316.2, B-413316.3, Dec. 27, 2016, 2017 CPD ¶ 12 at 5 (“[An offeror] who chooses to compete under an allegedly flawed solicitation does so at its own peril.”).

Here, we find reasonable the agency's view that the RFP included proposed hourly fringe benefits as part of the total employee hourly compensation. First, in requesting total proposed compensation plans, the solicitation directed offerors to provide hourly rates. Next, the solicitation guided offerors to use attachment 3, a sample compensation plan worksheet. AR, Tab 5, Attachment 3-Total Employee Compensation. Significantly, the worksheet was structured so that offerors would add the base labor rate to the total employee fringe benefit hourly rate to calculate the total employee hourly compensation. *Id.* (including the heading “Total Employee Hourly Compensation (Base + Fringe)). As a result, we agree with the agency that the solicitation reasonably put offerors on notice that proposed hourly fringe benefits would be considered as an included part of an offeror's total proposed compensation plan.

Thus, to the extent the protester concluded, based on its reading of the solicitation, that proposed hourly fringe benefits were not to be included in an offeror's total proposed compensation plan, such an interpretation is clearly in conflict with the compensation plan structure established by the worksheet provided in attachment 3 to the solicitation. We reach this conclusion despite the fact that, in one provision, the solicitation expressly stated that “bonuses and incentives” would be considered for purposes of the

total compensation cap. RFP at 76. While we agree that the language in the solicitation discussing the total employee hourly compensation rate could have been clearer, we nevertheless conclude that the various provisions discussed above created, at best, a patent ambiguity.

As stated above, an offeror that competes under a patently ambiguous solicitation does so at its own peril. *FFLPro, LLC, supra*. Accordingly, the protester's challenge to the agency's interpretation, raised here in AIMS's post-award protest, is therefore untimely.⁴ 4 C.F.R. § 21.2 (a)(1); see, e.g., *AOC Connect, LLC*, B-416658, B-416658.2, Nov. 8, 2018, 2018 CPD ¶ 384 at 6 (patent ambiguity exists where solicitation provisions appear inconsistent on their face).

Finally, we turn to the protester's principal contention that the agency unreasonably evaluated its proposed compensation plan. This argument, however, is premised on AIMS's allegation that the agency's interpretation of the RFP was unreasonable, and that the agency was not permitted to consider proposed hourly fringe benefits for purposes of the total compensation cap. In light of the discussion above, we find nothing improper about the agency's conclusion that AIMS's proposed compensation plan exceeded the compensation cap established by the solicitation. Therefore, we find no basis to sustain the protester's challenges to the agency's evaluation.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ Since we dismiss the protester's challenge to the agency's interpretation of the RFP's stated compensation cap as untimely, we need not resolve the protester's arguments about whether the solicitation's terms themselves are consistent with applicable procurement statutes and regulations. In this regard, our Office is providing no opinion as to the propriety of the solicitation's terms; rather, we are concluding that the protester is untimely to challenge these terms now.