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Decision

Matter of: ODL Services

File: B-421537; B-421537.2; B-421537.3

Date: May 25, 2023

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DIGEST

1. Protest challenging evaluation of proposals is dismissed where the agency's proposed partial corrective action renders the protest academic.
 2. Protest challenging award of bridge contract is dismissed as abandoned where the protester did not rebut or respond to the agency's arguments submitted in its agency report.
 3. Protest challenging the agency's refusal to permit proposal revisions following a solicitation amendment is dismissed as untimely where the amendment notified offerors that the agency would not accept proposal revisions. Moreover, any solicitation ambiguity introduced by the amendment was patent, not latent, and the protester's subsequent challenge of that ambiguity is also untimely.
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DECISION

Oscar Deuce, LLC, doing business as ODL Services, of Virginia Beach, Virginia, protests the award of a contract to Vector Solutions, Inc., of Glendale, Arizona, under request for proposals (RFP) No. FA002122R0008, which was issued by the Department of the Air Force, Special Operations Command, for MC-12 tactical system operator training support services, including airborne and ground training support. The protester challenges the agency's evaluation of proposals, award of a bridge contract, and decision not to permit proposal revisions after amending the RFP.

We dismiss the protest.

BACKGROUND

The agency issued the RFP on July 27, 2022, pursuant to the procedures in Federal Acquisition Regulation (FAR) part 15. Contracting Officer's Statement (COS) at 2. The RFP sought proposals for the provision of tactical systems operator training support services for MC-12 aircraft, including pilots, sensor operators, ground training personnel, schedule, registrar, and opposing force/mission rehearsal trainer support, at Will Rogers Air National Guard Base in Oklahoma City, Oklahoma. *Id.* The protester is the incumbent contractor for these services. See Protest at 1.

The RFP contemplated award of a single, fixed-price contract, with a one-year base period of performance, four 1-year options, and a six-month optional extension pursuant to FAR 52.217-8. COS at 2; Agency Report (AR), Tab 3, RFP at 8-9, 16-17. The RFP set forth two non-price factors--technical capability and past performance--with past performance being more important than technical capability. AR, Tab 5, RFP Attach. 2 at 1. The two non-price factors, when combined, were significantly more important than price. *Id.*

As relevant to the matters to be resolved here, paragraph 6.1 of the RFP's evaluation criteria consisted of a single sentence stating that "[p]rice proposals will be evaluated for Completeness, Balance, Reasonableness, and Realism." *Id.* at 10. In separate, following paragraphs--headed "Completeness," "Balanced pricing," "Reasonableness," and "Realism"--the RFP discussed how proposals would be evaluated for each of those aspects. *Id.* at 10-11. In particular, paragraph 6.6 was headed "Realism" and stated that the agency would evaluate the realism of offerors' professional compensation plans, as well as discussed the manner in which the agency would conduct that evaluation. *Id.* at 11.

While the RFP's evaluation criteria stated that the agency would evaluate professional compensation plans for realism, the RFP's instructions did not direct offerors to submit professional compensation plans. See *generally* AR, Tab 4, RFP Attach. 1. The instructions also stated that "[p]rice proposals deemed excessively low and/or excessively high may be rejected." *Id.* at 13.

Proposals were due by August 29, 2022. RFP at 1; AR, Tab 8, RFP Amend. 1 at 1. The agency received seven timely proposals, none of which included a professional compensation plan. COS at 7.

On September 1, after the submission of proposals, the agency issued an amendment to the RFP to remove paragraph 6.6 from the evaluation criteria. AR, Tab 10, RFP Amend. 2 at 1; Tab 11, RFP Amend. 2, Attach. 1 at 11. The amendment did not extend the time for proposals, and did not permit proposal revisions in response to the amendment. AR, Tab 10, RFP Amend. 2 at 1; COS at 7.

On February 15, 2023, the agency notified the protester that its proposal had not been selected for award. AR, Tab 35, Notice of Unsuccessful Offer. After a debriefing and follow-up questions, see AR, Tabs 36-38, the protester filed this protest with our Office.

DISCUSSION

The protester has challenged the evaluation of both its proposal and the awardee's proposal, the agency's award of a bridge contract following implementation of the stay of performance, and the agency's refusal to permit proposal revisions after amending the RFP. For the reasons discussed below, we dismiss the protest.

Evaluation Challenges

The protester has raised various challenges to the agency's evaluation of proposals under the non-price factors, contending that the agency unreasonably evaluated proposals and performed a flawed tradeoff analysis, as well as that the awardee engaged in a bait and switch. See Protest at 7-10, 11-14. On the day that the agency report was due and prior to filing the agency report, the agency filed a notice of partial corrective action and request for partial dismissal, stating that the agency intended to make a new best-value and award determination, and to take any other corrective action it deemed appropriate. See Notice of Corrective Action at 1. The agency indicated its belief that its partial corrective action would address all of the protester's evaluation challenges, and requested that we dismiss those challenges as academic or moot. See *id.* at 1-2. As addressed herein, the agency proceeded to submit an agency report responding to the remaining protest allegations. The protester did not advance any argument that the corrective action would not render its evaluation challenges academic. See *generally* Comments & Second Supp. Protest.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Honeywell Tech. Solutions, Inc.*, B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. We do not consider academic protests because to do so would serve no useful public policy purpose. *Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. We only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. *Id.*

As the agency's corrective action may result in a different award decision, it renders the protester's evaluation challenges academic. We therefore dismiss them.¹

¹ The protester has requested that we recommend the agency reimburse the protester its costs of filing and pursuing its protest with respect to the evaluation challenges. See Comments & Second Supp. Protest at 7-9. The protester argues that the agency's notice of corrective action was "unnecessarily late" because it was filed on the agency

Bridge Contract

After filing its initial protest, the protester submitted a supplemental protest challenging the agency's award of a bridge contract, which the protester believed to have been issued to Vector as a task order under a separate multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract. Supp. Protest at 2-5. The protester alleged that the agency had improperly issued the task order on a sole-source basis, and further that the task order exceeded the scope of the underlying IDIQ contract. *Id.*

The agency substantively responded to the protester's allegations, pointing out that the agency issued the task order in question to a joint venture of which Vector is a member pursuant to an exception to fair opportunity under FAR section 16.505(b)(2)(i)(A). Memorandum of Law (MOL) at 9-10. The agency further pointed out that it had awarded the task order under a different IDIQ contract than that alleged by the

report's due date, and asserts, without further explanation, that the protester was forced to incur additional protest costs. *See id.* at 8.

Under our Bid Protest Regulations, if the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). Our regulations require that the protester's request be filed no later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. *Id.*; *see also HEJV Energetics Joint Venture, LLC--Costs*, B-413104.39, Aug. 5, 2019, 2019 CPD ¶ 286 (requiring that a protester's request for a recommendation with respect to protest costs must be filed in accordance with applicable regulations and instructions).

At this time, the protester's request for recommendation of reimbursement of costs is premature. *See, e.g., SparkSoft Corp.*, B-420156, B-420156.2, Nov. 15, 2021, 2021 CPD ¶ 362 at 8 (supplemental protest requesting recommendation for reimbursement of costs dismissed as premature where filed prior to close of protest based on agency's decision to take corrective action). If the protester wishes to seek a recommendation for reimbursement of costs, such request may be filed after the closing of this protest, per our regulations.

Because the request is premature at this juncture, we express no opinion on the merits of the request. We note, however, that as a result of the agency's notice of corrective action, it does not appear that the protester was required to expend additional time or resources preparing comments with respect to the evaluation challenges, as the protester did not submit any comments relating to those challenges. In such circumstances, our Office has concluded that the purpose of section 21.8(e) of our regulations has been served, and therefore has found no basis for recommending reimbursement of a protester's costs. *See, e.g., Southern Aire Contracting, Inc.--Costs*, B-418070.3, Feb. 21, 2020, 2020 CPD ¶ 73 at 3.

protester, that the protester is not a holder of that IDIQ contract, and that the task order is within the scope of that contract. *Id.* at 5, 10-11. The agency also provided documents to support its statements regarding the issuance of the task order. See *generally* AR Tabs 53-59, 61-62. The agency therefore requested denial of the supplemental protest grounds relating to the award of the bridge contract, as the record contradicted the protester's allegations.

The protester did not rebut or respond to the agency's arguments in its comments. See *generally* Comments & Second Supp. Protest.

Where, as here, an agency provides a detailed response to a protester's assertion and the protester fails to rebut or respond to the agency's arguments in its comments, the protester fails to provide us with a basis to conclude that the agency's position with respect to the issue in question is unreasonable, and as a result, the protester abandons the assertion. *IntegriGuard, LLC d/b/a HMS Fed.--Protest and Recon.*, B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5; *Atmospheric Research Sys., Inc.*, B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 at 3-4. As the protester did not respond to the agency's arguments regarding the bridge contract, we conclude that the protester has abandoned this ground of protest. We therefore dismiss it.

Proposal Revisions

Lastly, the protester challenges the agency's refusal to permit proposal revisions after amending the RFP to remove paragraph 6.6 from the evaluation criteria. The protester alleges that the removal of that paragraph materially changed the RFP's terms by removing a price realism evaluation, and that the agency therefore was required to permit offerors to revise their proposals. Protest at 10. Alternatively, the protester alleges that the removal of paragraph 6.6 gave rise to a latent ambiguity whether the agency would conduct a price realism evaluation, and that if the protester had known of the agency's interpretation of the RFP as not requiring a realism evaluation, it would have altered its proposal. *Id.* at 10-11.

With respect to the first argument, the agency responds that the protester's allegation is untimely, as the amendment, which was issued after the receipt of proposals, notified offerors that the agency would not permit proposal revisions. See MOL at 7-8. Accordingly, the agency argues, the protester was required to challenge the terms of the RFP, as amended, within 10 days after issuance of the amendment. See *id.* We agree with the agency.

Our regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of providing parties a fair opportunity to present their cases, and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Peacock, Myers & Adams*, B-279327, Mar. 24, 1998, 98-1 CPD ¶ 94 at 3-4; *Professional Rehab. Consultants, Inc.*, B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must

be filed before that time. 4 C.F.R. § 21.2(a)(1). Where alleged improprieties do not exist in the initial solicitation, but subsequently occur (e.g., via an amendment to the solicitation), they generally must be protested not later than the next closing time for receipt of proposals. *Id.*; see *Armorworks Enters., LLC*, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 5. Where no further submissions are anticipated, however, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known. 4 C.F.R. § 21.2(a)(1); see also *Computer World Servs. Corp.*, B-418287.3, June 29, 2020, 2020 CPD ¶ 204 at 5 (explaining that the opportunity to make “further submissions” referred to in 4 C.F.R. § 21.2(a)(1) “amounts to an opportunity to submit revised proposals”) (citing 83 Fed. Reg. 13817, 13819 (Apr. 2, 2018)).

Here, the agency issued the amendment removing paragraph 6.6 after receipt of proposals. The amendment made clear that the agency would not permit proposal revisions. Accordingly, the protester must have filed its challenge that the agency was required to permit proposal revisions within 10 days of the amendment’s issuance on September 1, 2022. The protester filed its challenge here on March 15, 2023, well after that date. Accordingly, we dismiss this allegation as untimely.²

The protester further argues that the RFP amendment created a latent ambiguity whether the agency would conduct a price realism evaluation because the amended RFP still included the statement in the instructions that “[p]rice proposals deemed excessively low and/or excessively high may be rejected[,]” and the evaluation criteria still included the statement that “[p]rice proposals will be evaluated for Completeness, Balance, Reasonableness, and Realism.” Protest at 10-11; Comments & Second Supp. Protest at 1-5. We conclude that, to the extent the RFP was ambiguous following the removal of paragraph 6.6, any ambiguity was patent, not latent.

An ambiguity exists where two or more reasonable interpretations of the solicitation are possible. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. If the ambiguity is an obvious, gross, or glaring error in the solicitation (for example, where solicitation provisions appear inconsistent on their face), then it is a patent ambiguity; a latent ambiguity is more subtle. *A-P-T Research, Inc.*, B-414825, B-414825.2, Sept. 27, 2017 CPD ¶ 337 at 12; *Harper Constr. Co., Inc.*, B-415042, B-415042.2, Nov. 7, 2017, 2018 CPD ¶ 47 at 4. In order to be considered timely, a protest of a patent ambiguity must be filed prior to the closing time for submission of proposals. *DCR Servs. & Constr., Inc.*, B-415565.2, B-415565.3, Feb. 13, 2018, 2018 CPD ¶ 125 at 4 n.6; 4 C.F.R. § 21.2(a)(1). Where a patent ambiguity is not challenged prior to the submission of solicitation responses, we will not consider subsequent arguments

² Moreover, given that the amendment removed a paragraph pertaining only to the evaluation of professional compensation plans that were neither required by the agency nor submitted by any offeror, including the protester, it is unclear how the amendment changed the RFP’s terms in such a manner as to have required the agency to permit proposal revisions.

asserting the protester's own interpretation of the ambiguous provisions. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

Paragraph 6.1 of the RFP's evaluation criteria stated that "[p]rice proposals will be evaluated for Completeness, Balance, Reasonableness, and Realism." The terms Completeness, Balance, Reasonableness, and Realism all were capitalized, and corresponded to paragraphs headed by those terms. Paragraph 6.6 was the only paragraph in the RFP's evaluation criteria that substantively discussed the realism evaluation, and it addressed realism with respect only to offerors' professional compensation plans. Thus, as originally issued, the RFP indicated that the only realism evaluation the agency would conduct was of offerors' professional compensation plans; yet, the instructions did not require offerors to submit any such plans, and no offerors did submit them.

When the agency amended the RFP to remove paragraph 6.6, it neglected to remove the reference to Realism in paragraph 6.1. Read in context, however, that reference clearly pertained only to the analysis contemplated by paragraph 6.6, *i.e.*, the realism of professional compensation plans, not price proposals generally. Furthermore, as the terms in paragraph 6.1 only served to introduce the substantive discussion of the agency's evaluation in subsequent paragraphs--including paragraph 6.6--there was nothing left in the RFP setting forth the nature, scope, purpose, or methodology for any price realism evaluation after the agency amended the RFP to remove paragraph 6.6.

Thus, to the extent that the RFP was ambiguous regarding a price realism evaluation, that ambiguity was apparent on the face of the RFP. The amendment removed the only substantive discussion of a realism evaluation, leaving, at most, vestigial references to an evaluation of the realism of professional compensation plans that the RFP had never required offerors to submit. We conclude that any ambiguity therefore was patent, rather than latent, and the protester's challenge of this ambiguity, filed more than 10 days after issuance of the amendment that created the alleged ambiguity, is untimely.

The protest is dismissed.

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General Counsel