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Decision

Matter of: DGCI Corporation

File: B-421830.3

Date: April 5, 2024

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DIGEST

1. A solicitation requirement that is burdensome, or even impossible for a particular firm to meet, does not make the requirement objectionable if it properly reflects the agency's needs.
2. Protest that the solicitation places unreasonable risk on the contractor is denied where the level of risk is reasonably within the agency's discretion; a solicitation need not be drafted to eliminate all performance uncertainties.
3. Protest that certain solicitation terms conflict is dismissed as untimely where it was not filed prior to the next due date for receipt of proposals following the introduction of the challenged terms.

DECISION

DGCI Corporation, of McLean, Virginia, protests the terms of request for proposals (RFP) No. SPE605-23-R-0210, issued by the Defense Logistics Agency (DLA) for various types of fuel to be delivered to locations throughout Iraq. The protester alleges that the RFP's terms are unduly restrictive, conflicting, and place unreasonable risk on the contractor.

We deny the protest.

BACKGROUND

The agency issued the RFP on June 8, 2023, seeking various quantities of midgrade unleaded gasoline (“MUM”), diesel fuel (“DF2”), and turbine fuel (“JP8”), to be delivered to various military bases and warehouses throughout Iraq to be used for vehicles, generators, and aircraft. Agency Report (AR), Tab 2, RFP at 12-16.¹ For context, the agency explains in its report that the Iraqi government requires that fuel be purchased from Iraqi refineries via the Oil Products Distribution Company (OPDC) in southern Iraq. Combined Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 2.

The RFP contemplates the award of a firm-fixed-price requirements contract. RFP at 8. The solicitation provided for award on a lowest-priced, technically acceptable (LPTA) basis considering three factors: technical, past performance, and price. *Id.* at 123-125. The RFP includes three subfactors under the technical factor: supply, transportation, and storage/distribution. *Id.* at 123.

As relevant here, under the supply subfactor, the solicitation advises that DLA “will evaluate the [o]fferor’s supply plan to assess the [o]fferor’s ability to supply all of the products listed and in the estimated quantities stated in the schedule ([s]olicitation [p]rovision B1.05/DLA [f]uel specifications in [s]ection C).” *Id.* The solicitation adds that the following items are required to be submitted for consideration: “Certificates of Quality and/or Analysis (COQ/COA) for all products listed in the attached schedule of this solicitation, in accordance with the DLA [f]uel specifications in [s]ection C.”² *Id.* The performance work statement, in section C of the RFP, contains the fuel specifications that ensure the fuel products do not contain excessive amounts of certain chemicals or impurities.³ RFP at 12-16; 20-24. For example, these specifications dictate the permissible sulfur content in the fuel; the agency explains that a sulfur content exceeding the limits in these fuel specifications “risk[s] significant damage to the combustion engines (e.g., generators, trucks, security lighting) in which it is used,” contributing to air pollution and a shortened lifespan for necessary items like vehicles and generators. AR, Tab 27, Declaration at 3.

In section E, pertaining to inspection and acceptance, the solicitation incorporates the text of Federal Acquisition Regulation clause 52.246-2, Inspection of Supplies-Fixed-

¹ The agency amended the RFP ten times. All citations are to the Adobe PDF page numbers of the documents provided by the agency in its report. This citation is to the original RFP; other versions will be cited in the following format: AR, Tab X, amend. Y.

² Amendment 6 updated section C to specifically include southern Iraq as a region with corresponding DF2 and MUM fuel specifications. AR, Tab 11, RFP amend. 6 at 17, 19.

³ Diesel fuel that meets the required specifications for the locations listed in the RFP qualifies as DF2; gasoline that meets the specifications qualifies as MUM; and turbine fuel that meets the specifications qualifies as JP8. See COS/MOL at 5 (describing certain diesel products and gasoline products produced by OPDC refineries as “in the same ‘family’ as DF2 [and MUM]”).

Price, cautioning offerors that DLA “has the right either to reject or to require correction of nonconforming supplies,” with supplies being nonconforming “when they are defective in material or workmanship or are otherwise not in conformity with contract requirements.” RFP at 26. The solicitation also provides for waivers, giving the agency the option to, “at its discretion, accept nonconforming supplies or services.” *Id.* at 36. DLA in its report provides context for this waiver option, explaining that, while southern Iraq does have fuel meeting the required RFP specifications, it “is not uncommon for fuel sourced from OPDC refineries not to meet the [g]overnment’s specifications for DF2 and MUM,” often due to high sulfur content. COS/MOL at 4. The agency states it has used waivers previously for fuel supplied from OPDC refineries to locations in southern Iraq. *Id.* at 5.

On July 24, 2023, the due date for submission of proposals, DGCI filed its first protest with our Office challenging the terms of the solicitation. COS/MOL at 7. The agency took corrective action, proposing to review the solicitation and amend it as appropriate, whereupon our Office dismissed the protest as academic. *See DGCI Corporation, B-421830, Aug. 29, 2023* (unpublished decision). On September 20, DLA issued the sixth amendment to the RFP, which reopened the solicitation to receive revised proposals and, among other changes, revised the solicitation language for the technical supply subfactor, adding a “special note” that reads as follows:

For line items 1-4, 8, and 12-14, the COQ/COAs will be used solely to verify that tests have been conducted for all properties/elements required by the applicable specification. The COQ/COA for line items 1-4, 8, and 12-14 will not be otherwise evaluated for acceptability. A third-party laboratory is recommended to ensure that all properties/elements are tested per DLA specifications. See Attachment [No.] 7.

AR, Tab 11, RFP amend. 6 at 9.⁴ This amendment introduced a new solicitation attachment: attachment 7, fuel requirements for line items 1-4, 8, and 12-14. *Id.* at 16. This attachment stated that DF2 and MUM “may only be sourced from Iraqi refineries for line items 1-4, 8, and 12-14,” reiterated the requirement for DF2 and MUM to conform to fuel specification standards in the solicitation’s section C and acknowledged that “DF2 and MUM from the required local refineries may not always conform to these standards.” *Id.* The attachment also included a “special note” that “highly encouraged” offerors to “use a 3rd party laboratory to ensure all required test[s] are performed” and advised that “[o]n a case-by-case basis, DLA may issue exceptions to the [section C] requirements.” *Id.*

On October 4, the revised due date for receipt of proposals, DGCI filed its second protest challenging various terms and language in the RFP. COS/MOL at 8. After the agency again decided to take corrective action, our Office dismissed that protest as academic on November 3. *See DGCI Corporation, B-421830.2, Nov. 3, 2023*

⁴ Line items 1-4, 8, and 12-14 include JP8, MUM, and DF2 requirements to be delivered to locations in southern Iraq. *Id.* at 10-11.

(unpublished decision). Pursuant to this corrective action, the agency issued amendment 10 on December 20, correcting discrepancies and modifying language to which the protester had objected. COS/MOL at 9-10; see AR, Tab 18, RFP amend. 10. The amendment also replaced attachment 7. As relevant here, the replacement attachment included explicit language requiring JP8, in addition to MUM and DF2, to conform to the solicitation's established fuel specifications, for the sake of consistency. AR, Tab 18, RFP amend. 10 at 6. The attachment continued to acknowledge that "the fuel obtained from the required OPDC refineries may not always conform to these specifications" and directed contractors with nonconforming fuel to "obtain a deviation or waiver from the [c]ontracting [o]fficer[] prior to the [g]overnment's acceptance of the nonconforming supplies." *Id.* The attachment added language noting the agency's "discretion to grant or deny a deviation or waiver," and inserted the following language:

If the delivery of DF2, MUM, or JP8 does not meet the applicable specification and the [c]ontracting [o]fficer does not grant a deviation or waiver, the [g]overnment will not accept the delivery. The [g]overnment is not responsible for any costs related to any delivery not accepted due to the delivery not meeting the required specifications. However, if (i) the Contractor delivers DF2, MUM, or JP8 under Line Items 1-4, 8, or 12-14 using fuel sourced from an OPDC refinery, (ii) the product does not meet the required C16.18-2, C16.69-2, or C16.64-1 specification because the fuel the [c]ontractor obtained from the OPDC refinery does not meet the required specification, and (iii) the [c]ontracting [o]fficer denies a deviation or waiver, the [g]overnment will not terminate the order or contract for cause on the basis of the DF2, MUM, or JP8 delivery not meeting the required specification. Nevertheless, the [g]overnment is not responsible for any costs related to any delivery not accepted due to the delivery not meeting the required specifications.

AR, Tab 18, RFP amend. 10 at 6. In its report, the agency explains that the reason it added the revised attachment 7 language that states DLA would not view nonconforming fuel deliveries as a default was to recognize that it is not uncommon for OPDC refinery fuel to vary in quality, as it pertains to RFP fuel specifications for DF2 and MUM. COS/MOL at 10. On the revised December 29 due date for receipt of proposals, DGCI filed this protest.

DISCUSSION

DGCI raises numerous arguments in its protest, the majority of which it has withdrawn or abandoned. Among its remaining arguments, the protester asserts that it is impossible for contractors to comply with the solicitation's requirement to obtain DF2 from OPDC refineries. DGCI also contends that the solicitation places an unreasonable amount of risk on the contractor. Finally, the protester argues that solicitation language regarding JP8 testing conflicts with other solicitation terms and does not reasonably

reflect the agency's needs. After reviewing the record, we find no basis to sustain DGCI's protest.⁵

DF2 Fuel Specifications

First, the protester argues that it is impossible to comply with the solicitation's requirement to obtain DF2 from OPDC refineries.⁶ Protest at 13. Specifically, the protester contends that while OPDC refineries sell a diesel distillate, that product "is never compliant with DLA's DF2 fuel specification." Protest at 13-14.

The agency responds that diesel complying with DF2 specifications is available from OPDC refineries in southern Iraq, as evidenced by the fact that "in its proposal, DGCI proclaims it is ready, willing, and able to supply DF2 and MUM, sourced from OPDC refineries." COS/MOL at 13. The agency also contends that the protester's assertion is factually incorrect because DLA received "at least [REDACTED] offers" submitting DF2 fuel reports that demonstrated compliance with the RFP's fuel specifications. *Id.* The agency emphasizes that these fuel specifications ensure that the equipment and vehicles "required for operations, sustainment, and defense in [s]outhern Iraq" will function as reliably and effectively as possible. *Id.* at 14. Further, DLA asserts that it "has endeavored to provide some risk mitigation" by adding language to the solicitation in attachment 7 stating that the agency will not hold the contractor in default for nonconforming fuel sourced from OPDC refineries. *Id.* at 13-14 (citing AR, Tab 18, RFP amend. 10 at 6).

Agencies must specify their needs in a manner designed to permit full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs or as otherwise authorized by law. 41 U.S.C. § 3306(a). Where a protester alleges that performance is impossible, we will not substitute our judgment for that of the agency or sustain the protest in the absence of clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. *Chromalloy Component Servs., Inc.*, B-417362.2, Nov. 6, 2019, 2019 CPD ¶ 382 at 4. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not show that the agency's judgment is unreasonable. *Id.*

We note the agency's argument that the DF2 fuel specifications are not impossible to meet, as [REDACTED] offerors submitted compliant fuel reports for DF2 sourced from OPDC refineries and because DGCI itself "proclaims it is ready, willing, and able to

⁵ In its various protest submissions, DGCI has raised arguments that are in addition to, or variations of, those specifically discussed below. While we do not specifically address all the protester's arguments, we have considered all of them and find that they afford no basis on which to sustain the protest.

⁶ DGCI initially asserted that it was also impossible to obtain MUM, but then withdrew that aspect of the protest ground. Comments at 5.

supply DF2.” COS/MOL at 13. The protester’s insistence to the contrary does not show, by clear and convincing evidence, that this requirement concerning DF2 fuel specifications is impossible to meet. See *Chromalloy Component Servs., Inc., supra* at 6. This protest ground is denied.

Risk to Contractor

Next, the protester argues that the solicitation places unreasonable risk on the contractor. DGCI specifically challenges the language introduced in amendment 10’s version of attachment 7, warning that the agency “is not responsible for any costs related to any delivery not accepted due to the delivery not meeting the required specifications.” AR, Tab 18, RFP amend. 10 at 6. The protester asserts that contractors cannot control whether OPDC refineries meet RFP fuel specifications. Protest at 22. DGCI contends that this inherent uncertainty, combined with the optional nature of the waiver process and the solicitation language quoted above, places an unreasonable risk on the contractor, since the contractor would be required to purchase fuel that might be noncompliant, and for which DLA might not waive the fuel specification. *Id.* at 23.

The agency responds that the amount of risk the solicitation puts on the contractor is reasonable. DLA states that the delivery of fuel in Iraq “is already highly tenuous and risky” given the potential for “ISIS attacks, militia attacks, [and] dust storms,” and asserts that the possibility of “furnishing nonconforming fuel is one more of the many such risks that a contractor must account for.” COS/MOL at 20-21. DLA also contends that it “is unremarkable” for the agency to disclaim liability for delivered goods rejected for nonconformity; and this disclaimer “falls well within the boundaries” of permissible risk within a solicitation. *Id.* at 21.

There is no legal requirement that a solicitation be drafted so as to eliminate all performance uncertainties; the mere presence of risk does not render a solicitation improper. *Northrop Grumman Tech. Servs., Inc.*, B-406523, June 22, 2012, 2012 CPD ¶ 197 at 12. Offerors have the responsibility, in offering on a fixed-price contract, to project costs and to include in their proposed fixed prices a factor covering any projected costs increase. *Id.* Risk is inherent in most types of contracts, and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. *LOGMET LLC*, B-421838, Oct. 5, 2023, 2023 CPD ¶ 237 at 5.

The RFP acknowledges that fuel obtained from the required OPDC refineries “may not always conform” to the required section C specifications. AR, Tab 18, RFP amend. 10 at 6. Accordingly, the solicitation provides a waiver process through which the agency may still accept nonconforming fuel. *Id.*; RFP at 36. The record shows that nonconforming fuel presents a risk to the agency as well as the contractor; fuel with too much sulfur “risk[s] significant damage to the combustion engines (e.g., generators, trucks, security lighting) in which it is used.” AR, Tab 27, Declaration at 3. Further, the latest amendment of the RFP clarifies that DLA will not hold the contractor in default for

nonconforming fuel sourced from OPDC refineries. AR, Tab 18, RFP amend. 10 at 6. In other words, the record shows that this unique situation--delivering fuel in southern Iraq--creates uncertainty for both the agency and the contractor, which the agency has mitigated through its waiver process and other solicitation language. We do not agree with DGCI that the RFP provision absolving the agency of responsibility for the cost of nonconforming, unaccepted fuel deliveries constitutes unreasonable risk. See Protest at 22. Further, it is within the agency's discretion to structure a contract being competed in a way that imposes maximum risk on the selected contractor and minimum burdens on the agency. *OMNIPLEX World Servs. Corp.*, B-295698, B-295698.2, Mar. 18, 2005, 2005 CPD ¶ 43 at 3. This protest ground is denied.

JP8 Testing

Finally, the protester challenges a "special note" in the RFP under the technical factor's supply plan subfactor, which advises that, for JP8, "COQ/COAs will be used solely to verify that tests have been conducted for all properties/elements required by the applicable specification" and "will not be otherwise evaluated for acceptability."⁷ AR, Tab 11, RFP amend. 6 at 9. DGCI essentially argues that this language is inconsistent with the statement in attachment 7 to amendment 10 that "JP8 supplied under the contract shall conform to" the RFP's fuel specifications. Protest at 17-19; AR, Tab 18, RFP amend. 10 at 6.

The agency argues that this protest ground is untimely. DLA asserts that the challenged language--"solely to verify that tests have been conducted"--existed as of solicitation amendment 6, which established an October 4, 2023 due date for receipt of proposals and consequently made October 4 the deadline for DGCI to raise this ground. Req. for Partial Dismissal at 6.

DGCI responds that its argument is timely because the agency did not explicitly include JP8 in solicitation attachment 7 until RFP amendment 10; and the protester is raising this argument prior to the amended due date for receipt of proposals established in amendment 10. Comments at 25-30.

The agency counters that the "special note" language that DGCI is challenging was present in the RFP in a "*pre-existing* JP8 specification" prior to its appearance in amendment 10; the amendment simply moved this language from a different part of the solicitation. Req. for Partial Dismissal at 7. Specifically, DLA points to the RFP's section C, listing and describing the JP8, MUM, and DF2 fuel specifications. RFP at 20-23. Consequently, the agency argues that DGCI was aware of the alleged solicitation impropriety prior to the issuance of RFP amendment 10; that DGCI unsuccessfully "attempts to bootstrap its protest ground [] to the updated [a]ttachment 7"; and that this protest ground is untimely. Req. for Partial Dismissal at 6.

⁷ The solicitation language also pertains to MUM and DF2 to be delivered in southern Iraq, but the protester only challenges this language in connection with the JP8 fuel type. See Comments at 15.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). Where alleged improprieties are present in a solicitation and are not changed by a subsequent amendment, a protest challenging the unchanged specifications cannot be timely filed after the initial closing time for receipt of proposals. See *AeroSage, LLC*, B-416381.4, Dec. 21, 2018, 2018 CPD ¶ 432 at 3 n.6.

The record shows that the alleged conflict in language to which DGC1 objects existed as of RFP amendment 6. Amendment 6 introduced the limitation on how COQ/COAs would be used--“solely to verify that tests have been conducted”--and that statement remained unchanged by future amendments. AR, Tab 11, amend. 6 at 9. The requirement with which the protester claims this language is inconsistent--that JP8 supplied under the contract shall conform to the RFP’s fuel specifications--was present in the original RFP, which advised that DLA “will evaluate the [o]fferor’s supply plan to assess the [o]fferor’s *ability to supply all of the products listed* and in the estimated quantities stated in the schedule,” referring to the “DLA [f]uel specifications in [s]ection C.” RFP at 123 (emphasis added). The “products listed” refers to the fuel specifications in section C. These fuel specifications were listed in detail in the performance work statement. RFP at 20-23. This language also remained unchanged.

In sum, the “solely to verify that tests have been conducted” language existed as of RFP amendment 6, prior to amendment 10, and the *requirement* for JP8 fuel to meet the specification existed in the original RFP, in section C, although not in the exact wording that was later included in amendment 10. Consequently, based on our review of the record, we disagree with the protester that amendment 10 first made the alleged conflict in language apparent. See Comments at 25-30. Instead, the record shows that DGC1 had all the information it needed to raise this protest ground as of RFP amendment 6. The protester failed to raise its protest ground prior to the October 4 deadline for receipt of proposals established by RFP amendment 6. Accordingly, we dismiss this ground as untimely.

The protest is denied.

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